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NO.

In the Supreme Court of the United States

October Term, 1982

CITY OF WAUWATOSA FIRE DEPARTMENT,
Petitioner,

v.

STANLEY ORZEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does a municipal employer satisfy the burden of proving that age is a bona fide occupational qualification for line officer positions within its fire department when it establishes that (a) the state retirement system in which it participates authorizes compulsory retirement at that age; (b) the municipal ordinances compel such retirement; (c) studies by the state government over a 20 year period show that age 55 is the appropriate age for retirement of those classifications of employees whose continued employment can affect public safety and health; (e) it is conceded by the medical expert for the line officer that age does affect continued ability to perform at some point in time; and (f) the age selected is identical with the age selected by the federal government for its own employees working in the same job classifications?

2. Did the Court err in awarding liquidated damages in the circumstances of this case where the City was unaware of the application of federal law to its employees; where it took immediate steps to reinstate the employee after becoming aware of its application and before trial; and where the City amended its ordinance to raise the retirement age to 60 years pending final disposition of the case?

3. Did the Courts below err in denying the petitioner leave to raise the statute of limitations defense when the authoritative decision on that legal point by this Court was announced just two months before trial?

PARTIES

Petitioner, City of Wauwatosa, is a municipality located in Milwaukee County, State of Wisconsin. Stanley Orzel is an assistant fire chief employed by the City. The City and Orzel are the only parties to this case.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable The Chief Justice of the United States Supreme Court and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 697 F.2d 743 (7th Cir. 1983). It is reproduced in Appendix B (App. p. A-3).

The decision and order of the Magistrate in the District Court was not officially reported. It is reproduced in Appendix C (App. p. A-37).

JURISDICTION

The decision of the Court of Appeals was entered on January 3, 1983. The Petition for Rehearing was denied on May 12, 1983 (App. p. A-1). This Petition is being filed within 90 days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

FEDERAL AND STATE STATUTES AND CITY ORDINANCES INVOLVED

The federal statutes involved are the Age Discrimination in Employment Act of 1967, as amended in 1978, 29 U.S.C. § 621 *et seq.;* and Section 16 of the Fair Labor Standards Act, 29 U.S.C. §216, as amended by Section 11 of the Portal-to-Portal Act, 29 U.S.C. § 260.

The state statutes involved are § 41.02(11); (23); and § 41.11(1), 1977 Wis. Stats.

The local ordinances are Ordinances 2.78.010.

Relevant portions of these federal and state statutes and the local ordinances are printed as Appendix E (App. p. A-71).

STATEMENT

The Petitioner, City of Wauwatosa, is a municipal corporation located in the State of Wisconsin. It maintains a full-time, round-the-clock fire department consisting of 126 employees in various classifications and serves a community of approximately 51,000 residents.

The Respondent Orzel is an assistant fire chief. He is a line officer and is usually the first fireman to respond to an alarm.

The City ordinances compel law enforcement and firefighter personnel to retire after reaching age 55. This ordinance was enacted pursuant to authority granted by the Wisconsin statutes.

The State of Wisconsin maintains a state-wide retirement system which includes special provisions for the retirement of persons occupying "protective service occupations". The definition includes firefighters of all ranks. (See Appendix E, p. A-71.)

In May 1977 Respondent was notified that he would be retired effective December 31, 1978. During the 18 month hiatus respondent filed no charge with either federal or state agency. However, Respondent did request an extension of employment beyond age 55 which was denied by the City. During his retirement Respondent received full retirement benefits provided by the Wisconsin Retirement Fund.

After his retirement the respondent filed a charge with the Department of Labor, following which a conciliation effort was made. In 1979 jurisdiction to enforce the provisions of the ADEA was transferred by the President of the United States from the Department of Labor to the Equal Employment Opportunities Commission. The file involving the charge filed by respondent Orzel was not transferred. The file was closed. This case was filed in 1979. Jurisdiction of the District Court was invoked under 28 U.S.C. § 1337.

In the fall of 1979 the City learned that the EEOC had commenced litigation against other municipalities within the State and immediately took steps to reinstate Respondent to his position. An appointment was made for the Respondent to report to a medical clinic for a pre-em-

ployment physical examination. Although he originally agreed to this procedure, he later refused on advice of counsel. He continued on retirement during the year 1980. In February 1981, shortly before the commencement of the trial in this case, he was ordered to work without a physical examination (TR. 81). He has been on the payroll since that time.

After a trial, the Magistrate held in a written opinion that the City had failed to meet its burden of proving that age 55 was a bona fide occupational qualification for firefighters in the City of Wauwatosa. The Magistrate was willing to concede that age was a bona fide occupational qualification for firefighters and that some age short of age 70 would be an appropriate age for compulsory retirement of these employees. (App. p. A-50). However, the Magistrate held that the City failed to prove that age 55 was the precise or exact age at which all or substantially all firefighters were unable to perform their duties.

The Magistrate also held that the City had engaged in a "willful" violation of the ADEA and ordered liquidated damages. The actual wage loss was unjustifiably enhanced because the Magistrate rejected the City's argument that the Respondent refused to return to work in December 1979 on advice of counsel, and that he was not justified in refusing to take the pre-employment physical at that time. The Magistrate also rejected the City's position that the Respondent had failed to mitigate his damages by seeking other employment. He retired and simply accepted the Wisconsin Retirement benefits. All of these damages were doubled.

The Court of Appeals affirmed the Magistrate in all respects.

The opinion of Judge Pell, reluctantly concurring in the result, specifically recorded his view that if the case had been one of "first impresion * * * I might have been inclined to say that it was a reasonably necessary BFOQ." (App. p. A-33).

REASONS FOR GRANTING THE WRIT

1. Conflict Between the Circuits.

The Age Discrimination in Employment Act contains an express exclusion from coverage "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business * * *." 29 U.S.C.A. § 623(f)(1). Ever since its passage manifest uncertainty has beset the federal courts of appeal as to how its provisions should be applied to occupations that affect public safety.

Those courts of appeal that have considered cases involving public safety considerations have not been consistent in the application of a burden of proof. To date this Court has not passed upon these issues.[1]

The uncertainty in this area of the law has led to numerous filings, the awarding of large money judgments, and has strained employer-employee relations in the areas of hiring, promotion and retirement of firefighter and law enforcement personnel in almost every department in the country. No decision can be made by the employer on the acquisition or retention of personnel; no promo-

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[1] Recently the Ninth Circuit opined that this Court had passed on these issues in *EEOC v. Wyoming*, — U.S. —, 75 L.Ed.2d 18. See *EEOC v. County of Los Angeles*, 706 F.2d 1039. Petitioner in the case at bar asserts that *EEOC v. Wyoming* decided only the Constitutional issue.

tional objectives can be reasonably attained by employees within the ranks; no planning for promotions or training for replacements can occur; and no firm budget projections can be made as long as this uncertainty persists.

The Court below adopted the EEOC's interpretation of the burden of proof as set forth in § 1625.6 of its "Interpretations". That burden of proof is inconsistent with the ADEA statute. While such interpretation might be permissible in cases involving discrimination based on sex or race, it makes no allowance for the conceded fact that age, at some point below age 70, affects the ability of all human beings to perform the rigorous duties required of firefighters and law enforcement personnel.

In addition, the construction given the statute by the court below does not permit local governments to retire their firefighters and law enforcement personnel at the same age selected by the federal government for the compulsory retirement of its own employees working in the same job classifications.

2. Conflict Between The Circuits On The Liquidated Damages Rule.

The judgment below not only has the effect of compelling the petitioner to maintain four assistant fire chiefs when it needs only three, it orders the Petitioner to reimburse the Respondent to the full extent of wage and benefit loss for the two years he was retired, and adds an additional and like amount for "liquidated" damages.

The courts of appeal are divided as to whether the "good faith" defense of the Portal-to-Portal Act is applicable to actions under the ADEA. This Court has not resolved that conflict. However, even if the good faith defense is not available under ADEA, Congress made it

clear in the Act that liquidated damages could only be awarded in cases where the violation was "willful". 29 U.S.C.A. § 626(b).

The standard applied by the courts below to determine whether a "willful" violation of law occurred, if affirmed, would likely result in the automatic awarding of liquidated damages in every case. This result was not intended by Congress.

ARGUMENT

I. THERE IS CONFLICT BETWEEN THE CIRCUITS IN APPLYING THE "BONA FIDE OCCUPATIONAL QUALIFICATION" EXCEPTION.

The Court below rejected, as insufficient to meet the burden of proof, the evidence submitted by Petitioner to prove that age is a bona fide occupational qualification (BFOQ) for local firefighters. In so doing the Court adopted a standard recently promulgated by the Equal Employment Opportunity Commission (EEOC) which differs substantially from that used by the courts in previous cases and which conflicts with the view of this Court expressed in *EEOC v. Wyoming*, — U.S. —, 75 L. Ed.2d 18 (1983).

A. The EEOC Standard.

The Court below accepted, completely, the burden of proof rule adopetd by the EEOC several years after the passage of the Act and subsequent to Orzel's retirement and reinstatement. § 1625.6(b) of the EEOC's "Interpretations" of the Act states:

> "An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and

> either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact."

No support for this interpretation is found anywhere in the legislative history. In fact that burden of proof is inconsistent with legislative history and judicial precedent on this subject.

The compulsory retirement of employees engaged in public safety positions, by both federal and state governments, at an age earlier than that applied to non-protective classifications of employees has long held judicial support. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *McIlvaine v. State Police*, 296 A.2d 730 (1972), aff'd, 309 A.2d 801 (1973), appeal dismissed, 415 U.S. 986 (1974).

It has also received extensive legislative support in both Congress[2] and the state legislatures.[3]

On the retirement of law enforcemenet and firefighter classifications both Congress and the Wisconsin legislature have adopted identical ages (55 years). Appendix E, p. A-71.

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[2] 5 U.S.C. § 8335(b).

[3] More than one-half the states have adopted this kind of retirement law. *See EEOC v. Wyoming*, — U.S. —, 75 L.Ed.2d at 40, n. 2.

In an action which literally ignores, even defies, legitimate local employer-employee and public safety concerns, the federal government, through one of its administrative agencies (EEOC), is arguing in various pending cases that Congress actually intended that *federal* employees working in the classifications of firefighter and law-enforcement must be retired at age 55, but that Congress also intended that *state* and *local* employees working in these same classifications cannot be retired until they reach age 70.[4]

This position being advanced by the EEOC, which was adopted by the court below, has added to the considerable confusion among the various courts of appeal and among various panels of the same court.

The Seventh Circuit has held in previous cases that an employer involved in a business in which public safety considerations are paramount need only have a "rational basis" for imposing age restrictions on its bus driver employees. *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974); *cert. denied*, 419 U.S. 1122 (1975).

The Fifth Circuit arrived at the same conclusion in a case involving bus drivers but applied a standard approximating that being presently applied by the EEOC. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 236-7 (5th Cir. 1976).

The Seventh Circuit has also approved the compulsory retirement of commercial pilots at age 60 pursuant to an FAA rule. *Starr v. FAA*, 589 F.2d 307 (7th Cir. 1978).

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[4] *EEOC v. County of Los Angeles*, 706 F.2d 1039, 1041 (9th Cir. 1983). A federal prison guard can be legally compelled to retire at age 55 but an employee who guards state prisoners cannot be compelled to retire until age 70. *Cf. Bowman v. U.S. Dept. of Justice*, 510 F.Supp. 1183 (E.D. Va. 1981).

The Sixth Circuit refused to apply this same rule to pilots employed to fly executives of a private company in the absence of a separate evidentiary showing. *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982). However, that court was willing to impose a burden of proof which is much lower than that imposed by the EEOC and the court below. *See* 675 F.2d at 845-6.

The Seventh Circuit, in an earlier opinion, accepted the Wisconsin legislative *presumption* that retirement at age 55 for law enforcement officers constitutes a BFOQ. *EEOC v. Janesville*, 630 F.2d 1254, 1259 (7th Cir. 1980). However, in its decision in the case at bar the court adopted the recently announced EEOC standard *in toto* thus substantially changing the burden of proof to be applied in cases involving public safety employees.

It is clear that this new EEOC standard was not adopted by the Department of Labor while it had jurisdiction over the enforcement of ADEA. *See* 29 C.F.R. § 860.102(b) (1981) (superseded September 21, 1981). The administrative transfer of jurisdiction to enforce the Act to the EEOC in 1979 has resulted in changing the evidentiary rules and thereby in effect resulting in an unauthorized change in substantive law.

In the case at bar the Department of Labor had closed its file on the Orzel charge without commencing litigation and specifically declined to transfer the file to the EEOC for action (TR. 131). A witness called by the respondent Orzel, formerly employed by the D.O.L. and now employed by the EEOC, testified that the file was closed because it involved "a very, very gray area of the law" (TR. 133).

The issue presented in this case is also presented in dozens of cases pending in various federal courts.[5] In addition, employees are being retained beyond their normal retirement age only to avoid litigation and the potential assessment of enormous damages by federal courts against local taxpayers. Local governments are unable to promote, hire or train younger replacements for positions which clearly require the strength, agility and vigor of more youthful employees. In a few years it is possible that the Petitioner could have an entire shift of firefighters on duty between the ages of 65 to 70. The situation does not bode well for the safety and welfare of the community. Surely Congress did not require such mechanistic application of the law where the safety of the community is involved.

If the decision below prevails, local governments are required to fund a retirement system which, if unchanged, will provide disparate benefits for employees working in protective service classifications (they continue to earn increased pension after age 55) thus giving rise to dissatisfaction among employees working in other classifications of employment who will not obtain these increased benefits. It is not just or proper to dismiss these concerns, as did the Court below, with the comment that "economic factors cannot be the basis for a BFOQ * * *." (App. p. A-23)

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[5] In Wisconsin alone the following cases are pending: *EEOC v. Janesville*, 79-C-477; *Heiar v. Crawford County*, 82-C-273 (on appeal); *EEOC v. Marathon County*, 79-C-559; *Kossman v. Calumet County*, 81-C-419; *Huber v. Fond du Lac County*, 82-C-1216; *EEOC v. Dane County*, 80-C-578; *Knight v. Dane County*, 80-C-385. Some of these cases involve multiple plaintiffs. In addition cases are pending in other courts of appeal. *See, e.g., Johnson v. Mayor and City of Baltimore*, (4th Cir. 81-1112).

Congress never intended to intrude into the retirement policies applied by local governments to their firefighter personnel when it passed the ADEA.

B. The Standard Applied By The Court Below Is Inconsistent With the Standard Announced By This Court in *EEOC v. Wyoming*, — U.S. —, 75 L.Ed.2d 18.

In *EEOC v. Wyoming*, the entire Court expressed its concern with the application of federal law to the employees of local governments where public safety considerations are involved. Fitness to perform in emergency and life-threatening confrontations is a judgment which only those local officials responsible to the public are competent to make. It is their responsibility and, therefore, their "call".

The Court emphasized that truism with its statement, 75 L.Ed.2d at 31:

> "Perhaps more important, appellees remain free under the ADEA to continue to do *precisely what they are doing now*, if they can demonstrate that age is a 'bona fide occupational qualification' for the job of game warden. See *supra*, at 5. Thus, in distinct contrast to the situation in *National League of Cities, supra*, at 848, even the State's discretion to achieve its goals *in the way it thinks best* is not being overridden entirely, but is merely being tested against a reasonable federal standard."

The emphasis in the above quotation was supplied by the writer of the opinion.

What is the "reasonable federal standard" to which the opinion refers? The Petitioner submits that it is the standard which the federal government has adopted for its

own employees working in those same classifications — age 55. *See* U.S.C. § 8335.

Congress knew and drew on the state experience when establishing that age for retirement. 124 *Cong. Rec.* 30,589-30,602 (1978).

This Court has consistently deferred to the legislative judgment of both federal and state legislatures when their decisions did not conflict with Constitutional rights. In *City of New Orleans v. Dukes*, 427 U.S. 297, this Court said at 303:

> "Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage, our decisions presume the constitutionality of statutory discriminations and require that the classification challenged be rationally related to a legitimate state interest.

In an opinion which sustained the constitutionality of a New York compulsory retirement statute, the Second Circuit said:

> "The federal courts should not second guess wisdom or propriety of such state legislative resolutions as long as they are rationally based."
> *Palmer v. Ticcione*, 576 F.2d 459, 465 (2d Cir.), *cert. denied*, 440 U.S. 945 (1978).

The Seventh Circuit made the same ruling in *Trafelet v. Johnson*, 594 F.2d 623 (7th Cir. 1979) and *Slate v. Noll*, 474 F.Supp. 882 (W.D. Wis. 1979), aff'd, 444 U.S. 1107 (1980).

Not withstanding the decisions of this Court, the decisions of other circuits and the decisions of other panels of the same court, the decision of the court below in the case at bar constitutes a substantial departure from settled law

in the area of deference to legislative judgment where no constitutional rights are involved. Since federal law is supreme it also must be applied consistent with the *standards* it applies to itself. Federal law does not erect a double standard; especially where, as here, the overall federal policy intrudes so very deeply into the employer-employee relationships of local governments.

II. THERE IS A CONFLICT BETWEEN THE CIRCUITS ON THE RULE FOR AWARDING LIQUIDATED DAMAGES.

The Courts of Appeal are divided on the construction of the statute which authorizes an award of liquidated damages in age discrimination cases. The court below, in awarding liquidated damages, applied a rule which would make the damage award virtually automatic. But the Act states that these damages may be awarded only for "willful" violations.

In *Hays v. Republic Steel Corp.*, 531 F.2d 1307 (5th Cir. 1976) the circuit court held that a defense of "good faith" is available against a claim for liquidated damages under ADEA.[6]

Other Circuits have disagreed. *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979); *Wehr v. Burroughs Corp.*, 619 F.2d 276 (3d Cir. 1980); *Kelly v. American Standard, Inc.*, 640 F.2d 974 (9th Cir. 1981); *Goodman v. Hueblein, Inc.*, 645 F.2d 127 (2d Cir. 1981); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981).

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[6] This defense was added to the Fair Labor Standards Act, the enforcement procedures of which were incorporated with the ADEA.

The position of the 5th Circuit is strengthened by language used by this Court in *Lorillard v. Pons*, 434 U.S. 575, 582 (1978):

> "This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA."

However, whether or not the "good faith" defense is available, Congress clearly intended that liquidated damages would be awarded only in unusual, intentional or "willful" violations of the Act. No such willful violation occurred in this case.

The record is clear that Orzel was retired before anyone at the City knew or had reason to believe that the 1978 Amendments to the ADEA would preclude the continued retirement of firefighter and law enforcement personnel at age 55. Immediately after that issue came to the attention of City officials Orzel was offered reinstatement conditioned on his passing the standard, pre-employment physical. He refused to take this examination, after first agreeing to do so, and his recalcitrance delayed his reinstatement for over a year — thus doubling the judgment against the City.

The Court below relied on the existence of the federal district court decision *Aaron v. Davis* issued two years before the 1978 amendments to support its conclusion that the City knew or "should have known" of the existence of federal law in this area 424 F.Supp. 1238 (E. D. Ark. 1976). That decision, however, was clearly erroneous. Under the statute as written at that time compulsory retirement of employees pursuant to a bona fide retirement plan was clearly legal. *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977).

The Court below also charged the City with the knowledge of a 1977 decision which held constitutional the application of the federal ADEA to local governments. *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977). In addition, with decisions in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1967); and *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), sufficient confusion persisted on the constitutional issues until they were finally decided by this Court on March 2, 1983, *EEOC v. Wyoming*, -- U.S. —, 75 L.Ed.2d 18. The BFOQ issues in public safety employment remain to be resolved by this Court.

In the instant case, the City reinstated Orzel in January 1981. This occurred before trial, after two years of retirement, and without a physical examination. Since that time the City has had four assistant chiefs on its payroll rather than three. There is no evidence that Orzel's compulsory retirement on December 31, 1978, pursuant to state law and local ordinances, resulted from any intent to violate federal law. At no time did any "willful" violation of law occur. The Court below erred in so finding.

III. THE STATUTE OF LIMITATIONS EXPIRED BEFORE ANY CHARGE WAS FILED WITH THE STATE OR FEDERAL AGENCY. THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO PERMIT THAT DEFENSE TO BE RAISED AT TRIAL.

The plaintiff was notified on May 9, 1977 that he would be compelled to retire on December 31, 1978. On June 16, 1978 his application for continued employment was denied by the City. No charge was filed with either the federal or state agency until December 20, 1978. Un-

der *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the charge at that point was time barred.

The Magistrate rejected the Petitioner's efforts to raise this defense at trial (TR. 80). The point was not commented upon in the Magistrate's Decision, although the point was argued in the City's brief. The defense was not raised in the answer filed in June 1979 but the *Delaware* decision was announced by this Court in December 1980, only two months prior to the commencement of the trial.

The defendant submits that under the *Delaware* decision the statute of limitations began to run on May 9, 1977, when the plaintiff was notified that he would have to retire on December 31, 1978. The courts below should have permitted the City to raise this defense at trial.

CONCLUSION

The issue before the Court is of transcendent interest to more than half of the states (*EEOC v. Wyoming*, 75 L.Ed.2d at 40) and hundreds of local communities, all of which are charged by law and conscience to protect their citizens from fire, flood and crime. As pointed out in Mr. Chief Justice Burger's dissent in *Wyoming*, those states (and communities) do not insist on a right to discriminate. On the other hand, they face every day ". . . the very real danger that a fire may burn out of control because the firefighters are not physically able to cope; or that a criminal may escape because a law enforcement officer's reflexes are too slow to react swiftly enough to apprehend an offender; or that an officer may be injured or killed for want of capacity to defend himself." *EEOC v. Wyoming*, 75 L.Ed.2d at 43.

Surely Congress did not intend that the universally accepted presumption that the states and their subdivisions act in good faith in the discharge of their responsi-

bilities in this area should fall to an evidentiary rule which places the burden on the municipality to do more than show, as the petitioner here did that the retirement age at issue is the same adopted by the State Retirement System and many municipal corporations; is supported by a state study made over a 20 year period; is consistent with medical testimony acknowledging the significance of the age factor among classifications of employees in the public safety and health sector; and parallels the judgment of the federal government which has adopted the same retirement age for its own employees working in the same job classifications.

It is respectfully submitted that, for the reasons above stated, this petition be granted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

May 12, 1983

Before

Hon. WALTER J. CUMMINGS, Chief Judge*

Hon. WILBUR F. PELL, JR., Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

STANLEY ORZEL,

Plaintiff-Appellee,

vs.

No. 81-2564

CITY OF WAUWATOSA FIRE DEPARTMENT,

Defendant-Appellant.

ORDER

On consideration of the petition for rehearing filed in the above entitled cause by the Defendant-Appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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*Chief Judge Walter J. Cummings took the place of Judge Robert A. Sprecher, who was originally assigned to this case but, because of failing health, was unable to participate in the decision. Judge Sprecher died May 15, 1982.

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APPENDIX B

No. 81-2564

STANLEY ORZEL,

Plaintiff-Appellee,

v.

CITY OF WAUWATOSA FIRE DEPARTMENT,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 79 C 444—**Aaron E. Goodstein**, *Magistrate.*

ARGUED MARCH 29, 1982—DECIDED JANUARY 3, 1983

Before CUMMINGS, *Chief Judge,** PELL, and CUDAHY, *Circuit Judges.*

CUDAHY, *Circuit Judge.* The City of Wauwatosa, Wisconsin, appeals from the decision and order of a United States Magistrate finding the City liable, under the Age Discrimination in Employment Act (the "ADEA" or the "Act"), 29 U.S.C. §§ 621 *et seq.* (1976 & 1978 Supp.), for illegally terminating the employment of its Assistant

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* Chief Judge Walter J. Cummings took the place of Judge Robert A. Sprecher, who was originally assigned to this case but, because of failing health, was unable to participate in the decision. Judge Sprecher died May 15, 1982.

Fire Chief, Stanley Orzel, upon Orzel's attainment of the City's then-mandatory retirement age of 55. The City also challenges the magistrate's finding of a "willful" violation of the ADEA and his consequent award of liquidated damages under 29 U.S.C. § 626(b). We affirm.

I

Plaintiff, Stanley Orzel, is currently a 59-year-old resident of Wauwatosa, Wisconsin.[1] In 1949, Orzel was hired as a firefighter by the Wauwatosa Fire Department; thereafter he was promoted through the ranks until reaching the position of Assistant Chief, a position he held from 1970 until his compulsory retirement in 1978. In May 1977, the City informed Orzel that he would be forced to retire from his position as Assistant Chief on December 31, 1978, pursuant to the City's then-existing compulsory retirement age of 55 for all "protective service" employees.[2] Orzel's request to the City's employee relations committee for an extension of employment was denied, and Orzel was, in fact, mandatorily retired on December 31, 1978.

After unsuccessfully pursuing his administrative remedies, as required by section 626 of the ADEA, Orzel filed the instant lawsuit in federal district court. In his Complaint, Orzel sought reinstatement as well as compensatory and liquidated damages under section 626(b) of the ADEA.[3] In its Answer and supporting papers, the

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[1] Orzel was born October 24, 1923.

[2] "Protective service" employees are described and defined in Wis. Stat. Ann. §§ 41.02(11)(a) (1979), and include firefighters of all ranks. *See* Appellant's Br. at 7; Pl. Ex. 5.

[3] 29 U.S.C. § 626(b) (1976), which governs the award of damages to successful ADEA plaintiffs, provides:

> Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter.

City admitted that Orzel had been forced to retire at age 55, but claimed that this compulsory retirement did not violate the ADEA because age was a bona fide occupational qualification for the job of firefighter and because the ADEA could not constitutionally be applied to state and local governments.[4]

On May 6, 1980, the district court, pursuant to stipulation, ordered the case transferred to United States Magistrate Aaron E. Goodstein. A trial was held before Magistrate Goodstein on February 11-13, 1981. Prior to trial, the parties stipulated that the plaintiff, Stanley Orzel, was "physically and mentally in excellent condition and good health and that no claim is made that he personally was not capable of performing all fire department functions."

On August 31, 1981, Magistrate Goodstein issued a Decision and Order sustaining Orzel's claim of age discrimination and awarding Orzel both actual and liquidated damages. The magistrate, however, deducted from his damage award all amounts "received by the plaintiff from unemployment compensation benefits and retirement pension benefits," Decision and Order at 18, as well as "the amount of [plaintiff's] interim earnings." *Id.*, at 19. The magistrate also concluded, in the face of conflicting lower court authority, that damages for pain and suffering were not available under the ADEA and, hence, refused to include any such damages in his

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[4] After the appellate briefs in this case had been filed, this court in *EEOC v. Elrod*, 674 F.2d 601 (7th Cir. 1982), sustained the constitutionality of Congress' 1974 extension of the ADEA to state and local government employers. *See also EEOC v. County of Calumet*, No. 81-2120 (7th Cir. August 20, 1982), slip op. at 2-7 (application of ADEA to state and local governments constitutes proper exercise of Congress' power under § 5 of the Fourteenth Amendment). The constitutional issue raised by the City has, therefore, been conclusively resolved in this circuit and will not be addressed here.

award.[5] In awarding liquidated (or double) damages under section 626(b) of the Act, the magistrate noted that the statute provided for liquidated damages "only in cases of willful violations of this Act." Decision and Order at 21. After reviewing in some detail the development and chronology of Orzel's age discrimination claim, the magistrate found that the violation by the City could not be characterized as "accidental or unintentional," and that the City satisfied the standard for willfulness set forth in *Wehr v. Burroughs Corp.*, 619 F.2d 276, 280 (3d Cir. 1980).

In sustaining plaintiff's charge of discrimination, the magistrate also rejected the City's argument that age 55 constitutes a bona fide occupational qualification ("BFOQ"), under section 633(f)(1) of the ADEA, for the job of firefighter in Wauwatosa, Wisconsin.[6] The magistrate concluded that, although the evidence presented by both sides indicated that *some* age below the federally protected limit of 70 could qualify as a BFOQ, the City

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[5] At the time the m gistrate issued his decision, this court had not yet addressed the question whether damages based on pain and suffering were compensable under the ADEA, and district courts within this circuit had reached conflicting results on the issue. *Compare, e.g., Morton v. Sheboygan Municipal Hospital*, 458 F. Supp. 804, 807 (E.D.Wis. 1978) *and Buchholz v. Symons Mfg. Co.*, 445 F. Supp. 706, 713 (E.D.Wis. 1978) (damages for pain and suffering appropriate form of relief under ADEA) *with Jaeger v. American Cyanamid Co.*, 442 F. Supp. 1270, 1272-73 (E.D. Wis. 1978) (compensatory damages for pain and suffering not available under ADEA).

Recently, in *Pfeiffer v. Essex Wire Corp.*, No. 81-1266 (7th Cir. July 8, 1982), this court held that neither punitive damages nor damages for pain and suffering are available under the ADEA.

[6] 29 U.S.C. § 623(f)(1) provides, in pertinent part, that it shall not be unlawful for an employer

> (1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . .

had failed to establish either that a mandatory retirement age of 55 was reasonably necessary to the efficient operation of its fire department, or that substantially all persons over 55 would be unable to perform firefighting duties:

> It is the opinion of this court that the Wisconsin legislative history is not sufficient to satisfy defendant's burden that age 55 is a BFOQ. There is a lack of evidence to convince this court that the selection of age 55 represented the appropriate balancing test that the policy underlying the ADEA requires. *There is not a scintilla of evidence to relate age 55, as opposed to ages 50 or 60, to the public interest and safety.*

Magistrate's Decision and Order at 14 (emphasis supplied).

On appeal, the City challenges the magistrate's conclusion that age 55 is not a valid BFOQ for the job of firefighter. Citing this court's decision in *EEOC v. Janesville*, 630 F.2d 1254 (7th Cir. 1980), the City argues that "once it is conceded that an age less than 70 is a BFOQ, the judgment made by the appropriate local officials should be approved." Appellant's Br. at 22. The City also argues that its selection of age 55 is supported by (1) federal and state legislative history; (2) findings made and reported in other judicial decisions; and (3) the medical and other evidence submitted in this case. *Id.*

On the question of damages, the City urges that because the legal issues surrounding the application of the ADEA to the compulsory retirement of municipal firefighters "were at no time clear and unambiguous," and because "[t]he City had and still has a legally justifiable basis for contesting plaintiff's claim," the magistrate erred in finding a willful violation of the Act and in awarding double damages pursuant to 29 U.S.C. § 626(b) (1976). The City also argues that the magistrate's award of actual damages should be significantly reduced because the plaintiff violated his duty to mitigate and that, in any event, the plaintiff should not be compensated for any damages incurred subsequent to December

21, 1979, when he rejected an offer by the City to return to work.[7] We shall first address the BFOQ issues before turning to the question of damages.[8]

II

The ADEA, originally enacted in 1967, makes it unlawful for any employer, employment agency or labor organization to discriminate on the basis of age against persons between the ages of 40 and 70.[9] Congress' goals in passing the ADEA were threefold: to promote the employment of older workers based on ability rather than age; to prohibit arbitrary age discrimination in employment; and to aid employers and workers in studying the relationship between age and employment. 29 U.S.C. § 621(b) (1976); *EEOC v. Elrod*, 674 F.2d 601, 604 (7th Cir. 1982). Although the ADEA generally prohibits employers from relying solely upon age as a measure of individual ability, the Act contains several exceptions which allow the use of age as an employment criterion in certain, limited, situations. The most important of these exceptions—the BFOQ exception—allows an employer to discriminate, on the basis of age, against members of the statutorily protected class if "age is a bona fide occupational qualification *reasonably necessary to the nor-*

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[7] This offer of reinstatement by the City, which was expressly conditioned upon Orzel's taking and passing a physical exam, is discussed further at pp. 24-25 *infra*.

[8] Defendant also argues, most strenuously in its Reply Brief, that Orzel did not timely file his discrimination charge with the appropriate federal and state agencies and, thus, that the statute of limitations bars this action. The City, however, did not raise this defense in its Answer or in any other pleading; the defense has, therefore, been waived. *Wagner v. Fawcett Publications*, 307 F.2d 409, 412 (7th Cir. 1962).

[9] As originally enacted, the ADEA applied only to persons between the ages of 40 and 65. In 1978, however, Congress raised the upper age limit to 70 years of age. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189 (codified at 29 U.S.C. § 631 (1980 Supp. I)).

mal operation of the particular business." 29 U.S.C. § 623(f)(1) (1976) (emphasis supplied).

Because the BFOQ exception frees an employer from the ADEA's general requirement of making individualized judgments regarding the ability of older workers, overuse of the exception involves the risk of reintroducing on a broad scale the very age stereotyping the ADEA was designed to prevent. For this reason, and because of the general maxim that exceptions to a remedial statute are to be "narrowly and strictly construed," *Sexton v. Beatrice Foods Co.*, 630 F.2d 478, 486 (7th Cir. 1980), the courts have consistently held that the BFOQ exception to the ADEA is to be interpreted narrowly, and that the burden is on the employer to demonstrate its applicability. *See, e.g., EEOC v. Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980); *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2299 (1982); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977); *cf. Dothard v. Rawlinson*, 433 U.S. 321, 324 (1977) (BFOQ exception to Title VII was meant to be an "extremely narrow exception"). Moreover, both the Department of Labor, the federal agency originally entrusted with the enforcement of the ADEA, and the Equal Employment Opportunity Commission, to whom enforcement responsibilities were transferred in 1979, have consistently advocated an extremely narrow interpretation of the BFOQ defense.[10]

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[10] In 1968, the Department of Labor issued an Interpretive Bulletin designed to assist employers in understanding and complying with the ADEA. This Bulletin anticipated that the "concept of a bona fide occupational qualification will have limited scope and application," and stated that "the burden of proof in establishing that [the exception] applies is the responsibility of the employer. . . . [who] relies on it." 29 C.F.R. 860.102(b) (1981) (superseded, September 21, 1981). The Bulletin further noted that "[w]hether occupational qualifications will be deemed 'bona fide' and 'reasonably necessary to the particular business,' will be determined on the

(Footnote continued on following page)

Such an interpretation by the agencies charged with enforcement of the ADEA is, of course, entitled to considerable weight. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

With these general considerations in mind, we turn to an examination of the particular BFOQ defense asserted by the City in the instant case. In contending that age 55 constitutes a valid BFOQ for local firefighters, the City raises essentially three arguments. First, the City notes, correctly, that federal firefighters are ordinarily required by statute to retire at age 55.[11] Observing that the relevant federal retirement statute was passed by the same Congress that extended the proscriptions of the ADEA to state and local governments, the City argues that Congress could not possibly have intended to prohibit state and municipal employers from adopting age 55 as a mandatory retirement age for local firefighters while, at the same time, authorizing compulsory retirement of federal firefighters at that same age. We find this argument unpersuasive for several reasons.

Initially, we note that the federal retirement statute contains an express provision allowing the head of the appropriate federal agency, "when in his judgment the public interest so requires, [to] exempt [a federal firefighter] from automatic separation under this subsection until that employee becomes 60 years of age." 5

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[10] *continued*
basis of all the pertinent facts surrounding each particular situation." *Id.*

These statements were repeated, in substantially unchanged form, in the final ADEA Interpretive Regulations issued by the EEOC on September 21, 1981. *See* 46 Fed. Reg. 47724, 47727 (1981) (to be codified at 29 C.F.R. § 1625 *et seq.*).

[11] 5 U.S.C. § 8335(b) (1976) provides that a federal firefighter or law enforcement officer who is otherwise eligible for immediate retirement "shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age."

U.S.C. § 8335(b) (1976). Thus, unlike the compulsory retirement scheme in place in Wauwatosa at the time of Orzel's termination, the federal retirement scheme expressly allows for individualized determinations of fitness in exceptional cases.[12]

More important, the fact that Congress has determined that age 55 is an appropriate retirement age for one group of firefighters does not automatically establish that the same retirement age is a valid BFOQ, under section 623(f) of the ADEA, for a wholly different group of employees, operating under different working conditions and performing significantly different job functions. *See Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) (existence of FAA "Age 60 Rule" for commercial airline pilots does not establish, as valid BFOQ, same retirement age for non-commercial pilots). Nothing in the record here indicates that the tasks performed by local firefighters in Wauwatosa, Wisconsin are substantially identical to those carried out by federal firefighting personnel; indeed, the City, in its appellate brief, seems to suggest the opposite.[13] Moreover, as a legal matter, mandatory retirement schemes approved by Congress for federal employees are not subject to the strict requirements of the ADEA, *Stewart v. Smith*, 673 F.2d 485 (D.C. Cir. 1982); rather, such schemes need only be rationally related to a permissible government objective. *Vance v. Bradley*, 440 U.S. 93, 97 (1979). Only those age limitations that are so unreasonable as to constitute an

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[12] The City of Wauwatosa's compulsory retirement ordinance did allow the city council to grant extensions of employment for up to five years to those employees "who will not have accumulated twenty-five years of creditable service under the Wisconsin Retirement Fund at the time they reach normal retirement date." Extensions based on individual fitness, however, were not permitted. *See* Pl. Exs. 6, 7.

[13] At page 13 of its appellate brief, the City states that "in recent years there have been few fires in [Wauwatosa]" and that "[a]t the time of trial there had been no major fire in Wauwatosa in many years."

arbitrary and capricious exercise of legislative power will fail this test. *Id.*; *see Starr v. Federal Aviation Administration*, 589 F.2d 307 (7th Cir. 1978) (upholding, under abuse of discretion standard, FAA rule prohibiting persons over age 60 from serving as commercial airline pilots; distinguishing between this standard and BFOQ analysis necessary to sustain age qualification against challenge brought pursuant to ADEA). Under the ADEA, by contrast, compulsory retirement schemes must not only be arguably rational; they must also be *reasonably necessary* to the operation of the particular business in question. 29 U.S.C. § 623(f)(1) (1976); *Harriss v. Pan American World Airways*, 649 F.2d 670, 677 (9th Cir. 1980) (district court applied erroneous BFOQ standard in requiring only that challenged policy be "reasonable" in light of safety factors rather than "reasonably necessary" to the efficient operation of the employer's business). Thus, an employer seeking to justify its mandatory retirement age as a valid BFOQ must satisfy a much more stringent evidentiary test than the mere rationality requirement imposed on federal retirement schemes. *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 845-46 (6th Cir. 1982).

Also noteworthy in this regard is the fact that in April 1982, the Sixth Circuit reversed the district court decision upon which the City here principally relies to support its contention that the federal retirement statute establishes, as a matter of law, the "reasonable necessity" of the City's analogous retirement age. In *Tuohy v. Ford Motor Co.*, 490 F. Supp. 258 (E.D. Mich. 1980), a district court had granted summary judgment in favor of an employer in an ADEA action on the ground that the employer's adoption, for its own pilot-employees, of the age 60 retirement rule promulgated by the FAA for commercial pilots was *per se* reasonable and, hence, qualified as a valid BFOQ for purposes of the ADEA. 490 F. Supp. at 264. The district court in *Tuohy* concluded that where safety is a paramount factor, as it is in the case of airline pilots, the ADEA required no more of an employer than that its rule be "reasonable"; it then held that a mandatory retirement age based upon the related

determination of an "appropriate federal agency" necessarily satisfied that standard. *Id.* at 263-64.

The Sixth Circuit, in *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982), reversed, holding that the existence in the record of conflicting evidence regarding "the ability of medical science to make determinations concerning a particular pilot's state of health independent of age," created a material issue of fact bearing upon the "reasonable necessity" of Ford's mandatory retirement policy. 675 F.2d at 845. In its opinion, the Sixth Circuit expressly rejected the district court's conclusion that the "Age 60 Rule" promulgated by the FAA pre-empted further inquiry into the "reasonable necessity" of Ford's analogous mandatory retirement scheme:

> The presence of an overriding safety factor might well lead a court to conclude as a matter of policy that the level of proof required to establish the reasonable necessity of a BFOQ is relatively low. However, this is quite different from dispensing with the requirement of necessity and holding that a BFOQ has been established as a matter of law because adoption [by another body] of a rule based on age was reasonable.

675 F.2d at 845 (citations omitted).

We agree with the reasoning of the Sixth Circuit in *Tuohy* and, therefore, reject the City's contention that the presence of a statutorily mandated retirement age of 55 for federal firefighters automatically establishes the validity of the City's BFOQ defense. Rather, we hold that to avoid liability under the ADEA, the City must still demonstrate, by objective and credible evidence, that its compulsory retirement rule qualifies as a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business" in question. 29 U.S.C. § 623(f)(1) (1976).

III

The City next contends that in rejecting age 55 as a valid mandatory retirement age for local firefighters, the

magistrate failed to give sufficient deference to the judgment of the Wisconsin state legislature and, further, applied an erroneous legal standard which has been rejected in previous Seventh Circuit age discrimination cases. We reject these contentions.

First, the Wisconsin Retirement Fund Act, Wis. Stat. Ann. ch. 41 (1979), upon which the City seeks to rely, does not mandate compulsory retirement of protective service employees at *any* age. Rather, the statute merely sets age 55 as a "normal retirement date" for purposes of determining pension eligibility. *See* Wis. Stat. Ann. § 41.02(23) (1979). Individual municipalities remain free to extend employment beyond that date for as long as they see fit. *Id.* Moreover, surveys conducted by the Wisconsin Retirement Research Board indicate that, as of 1972, only 1 of the 100 largest cities in the country required mandatory retirement of firefighters at age 55, and that almost 50% of the cities surveyed used age 65 for this purpose. Tr. 307; Def. Ex. D at 10-11.[14] The reports of the Retirement

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[14] Similar survey evidence was viewed as highly significant in *Johnson v. Baltimore*, 515 F. Supp. 1287 (D. Md. 1981), *cert. denied*, 102 S. Ct. 1440 (1982), in which the court rejected a municipality's claim that mandatory retirement of firefighters at age 60 constituted a valid BFOQ:

> Defendants' selection of the arbitrary age of sixty for the mandatory retirement of Baltimore firefighters is particularly suspect in view of what other municipal fire departments have done. A survey of the mandatory retirement ages of fire department personnel in thirty of the largest cities in the United States indicates that only four cities have a mandatory retirement age of sixty. Twenty-two cities have a retirement age of sixty-five or older or have no mandatory retirement age at all for firefighters. Nothing in the record indicates that Baltimore Fire Department personnel perform duties any more arduous than those undertaken in other cities. To accept defendants' contention that substantially all firefighters above age sixty cannot safely and effectively perform their duties would indicate that a large number of fire departments across the country are inadequately or improperly manned.

515 F. Supp. at 1297 (footnote omitted).

Research Board further show that, as of 1973, the average compulsory retirement age for local Wisconsin firefighters was 63.6; perhaps even more significantly, they indicated that, historically, there has been little, if any, correlation between the "normal retirement date" defined in the state statute and the actual mandatory retirement ages set by individual Wisconsin municipalities for their "protective service" employees. Tr. 327; Def. Ex. E at 2-3. Indeed, the fact that the City of Wauwatosa was able, during the pendency of this litigation, to raise its compulsory retirement age for firefighters from 55 to 60 without any prior approval or objection from the state, severely undercuts the argument that the City considered itself bound by the state's suggested "normal retirement date." Thus, the City's attempt to invoke the judgment of the Wisconsin state legislature to support its BFOQ defense is not persuasive here.

Moreover, even if the state of Wisconsin had set age 55 as a mandatory retirement age for all firefighters within the state, we would be unable to accord that judgment the extreme deference urged by the City here. It is true that, as a general matter, state legislative judgments are entitled to considerable deference. *EEOC v. Janesville*, 630 F.2d 1254, 1259 (7th Cir. 1980). We do not believe, however, nor do we read the *Janesville* decision as holding, that in situations where a state or local government's forced retirement of older employees is being challenged under the ADEA, state mandatory retirement schemes are automatically to be presumed valid. Such a presumption flies in the face of the 1978 ADEA Amendments, which explicitly abolished the exception previously read into the ADEA for compulsory retirement made pursuant to a bona fide retirement plan.[15]

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[15] With regard to this exception, the Conference Report accompanying the 1978 Amendments stated:

> The conferees agree that the purpose of the amendment to section 4(f)(2) is to make absolutely clear one of the original purposes of this provision, namely, that the excep-

(Footnote continued on following page)

Moreover, as a practical matter, application of a statutory presumption of validity to a state mandatory retirement scheme would effectively shift to the employee challenging that scheme the burden of refuting his employer's BFOQ defense. *EEOC v. St. Paul*, 671 F.2d 1162, 1167 (8th Cir. 1982). Such burden shifting, however, contravenes the settled law of both this and other circuits that it is the employer—not the employee—who has the burden of establishing a BFOQ defense. *See, e.g., EEOC v. Janesville, supra*, 630 F.2d at 1258; *Smallwood v. United Airlines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2299 (1982); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).

Application of a statutory presumption of validity would also put state and local governments in a much better position under the ADEA than private employers—a result which is contrary to the express intent of Congress in extending the ADEA's protections to state and local government employees.[16] Moreover, cases

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[15] *continued*

tion does not authorize an employer to require or permit involuntary retirement of an employee within the protected age group on account of age.

In *McMann v. United Airlines*, [434 U.S. 102] (1977), the Supreme Court held to the contrary, reversing a decision reached by the Fourth Circuit Court of Appeals, 542 F.2d 217 (1976). The conferees specifically disagree with the Supreme Court's holding and reasoning in that case.

H. Conf. Rep. No. 950, 95th Cong., 2d Sess. 7, *reprinted in* 1978 U.S. Code Cong. & Ad. News 528, 529.

[16] *See, e.g.*, H. R. Rep. No. 913, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 2811, 2850 ("The committee expects that expanded coverage under the Age Discrimination in Employment law will remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as it has and continues to do in private employment."); 120 Cong. Rec. 8768 (1974) (remarks of Senator Benson) ("The passage of this measure insures that Government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector.").

which have discussed the BFOQ exception in the sex discrimination context have not suggested that government employers should be treated any differently under the Act than private employers. *See Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977); *id.* at 339 (Rehnquist, J., concurring); *EEOC v. St. Paul*, 671 F.2d 1162, 1167 (8th Cir. 1982); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980). Of course, to the extent that the 1978 ADEA Amendments conflict with existing state mandatory retirement statutes, the Supremacy Clause dictates that federal law prevail. *EEOC v. County of Santa Barbara*, 666 F.2d 373, 378 (9th Cir. 1982); *see Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-39 (1973); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).[17]

Defendant next contends that the magistrate erred in requiring the City, in order to prevail on its BFOQ defense, to demonstrate *either* that it had a factual basis for believing that all or substantially all persons over age 55 would be unable to perform safely and effectively the duties of the job, *or* that "it is impossible or impracticable to deal with persons over the age limit on an individual basis." Decision and Order at 9, quoting *Johnson v. Baltimore*, 515 F. Supp. 1287, 1295 (D. Md. 1981), *cert. denied*, 102 S. Ct. 1440 (1982). Citing this court's decision in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975), the City argues that it should only have been required to show that it made a "good faith judgment concerning the safety needs" of its citizens, and that its mandatory retirement policy should be upheld as long as that policy is "not

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[17] *See also* 29 C.F.R. § 1625.6(c) (1981 Supp.):

> Many State and local governments have enacted laws or administrative regulations which limit employment opportunities based on age. Unless these laws meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act, they will be considered in conflict with and effectively superseded by the Act.

the result of an arbitrary belief lacking in objective reason or rationale." Appellee's Br. at 30, quoting *Greyhound, supra*, 499 F.2d at 863. We reject such an expansive reading of the *Greyhound* decision. In that case, an unsuccessful job applicant challenged, under the ADEA, Greyhound's policy of refusing to consider applications for intercity bus drivers from persons over 35 years of age. This circuit, in one of the first federal appellate decisions to interpret the BFOQ exception, refused to impose upon Greyhound the strict requirement that it establish, to a certainty, that all or substantially all applicants over age 40[18] would be unable to perform the duties of the job in question. Rather, the court held that in order to prevail on its BFOQ defense, Greyhound was required to demonstrate only "that the essence of its operations [i.e., the safe transportation of passengers] would be endangered by hiring drivers over forty years of age." 499 F.2d at 862. The court went on to conclude that Greyhound had met this burden by introducing "an array of evidence" relating, *inter-alia*, to the rigors of Greyhound's extra-board work assignment system (under which those drivers with the least seniority, regardless of age, are forced to accept the longest and most arduous route assignments), the degenerative and hard-to-detect physical and sensory changes which begin in a person's late thirties and progress steadily thereafter, and the statistically documented fact

> that Greyhound's safest driver is one who has sixteen to twenty years of driving experience with Greyhound and is between fifty and fifty-five years of age, an optimum blend of age and experience with Greyhound which could never be attained in hiring an applicant forty years of age or older.

499 F.2d at 863.

In sustaining Greyhound's BFOQ defense, this court also relied heavily on the inability of individualized

[18] Although Greyhound's hiring policy disqualified all applicants over age 35, the ADEA protects only those persons between the ages of 40 and 70.

testing to achieve Greyhound's safety goals. The court emphasized that while a hiring program based on "functional" rather than chronological age might be desirable, "it is unclear that functional age is readily or practicably determinable" in this context. *Id.* at 864. Moreover, the court noted that

> [e]ven assuming that Greyhound's examinations of driving skills other than the physical examination can adequately screen out degenerative disabilities occasioned by age in the forty to sixty-five age bracket, it is questionable whether Greyhound could practicably scrutinize the continued fitness of such drivers on a frequent and regular basis.

Id. Finally, the court noted with approval Greyhound's contention that

> even though an applicant between age forty and sixty-five may satisfactorily perform on the driver qualification examinations so that at the outset he would be entitled to employment, there is no way of telling how safely he will perform for a sustained period of time given the fact that he will be assigned to the arduous tasks involved on the extra-board at a time when his body begins to undergo degenerative changes due to the aging process.

Id. On the basis of this evidence, as well as the extensive medical, statistical and expert industry testimony introduced by Greyhound, the court concluded that Greyhound had succeeded in demonstrating both the "reasonableness" and the "necessity" of its challenged hiring rule.

We thus read *Greyhound* as supporting the view that, in order to prevail on a BFOQ defense, an employer must show that the challenged age qualification is reasonably related to the "essential operation" of its business, *and* must demonstrate *either* that there is a factual basis for believing that all or substantially all persons above the age limit would be unable to effectively perform the duties of the job, *or* that it is impossible or impracticable

to determine job fitness on an individualized basis.[19] Such a two-pronged interpretation of the BFOQ defense is consistent with the standard adopted by the Fifth Circuit in *Usery v. Tamiami Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976), which relied on the same Fifth Circuit cases cited by the *Greyhound* court; it also accords with the approach taken by virtually every other circuit that has addressed the scope of the BFOQ exception. *See, e.g., Tuohy v. Ford Motor Co.*, 675 F.2d 842, 844-46 (6th Cir. 1982); *Stewart v. Smith*, 673 F.2d 485, 491 n.26 (D.C. Cir. 1982); *Smallwood v. United Airlines*, 661 F.2d 303, 307 (4th Cir. (1981), *cert. denied*, 102 S. Ct. 2299 (1982); *Harriss v. Pan American World Airways*, 649 F.2d 670, 676 (9th Cir. 1980); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).[20]

Moreover, such a two-pronged formulation of the employer's burden tracks, almost verbatim, the BFOQ regulations recently adopted by the EEOC. *See* 46 Fed. Reg. 47,727 (1981) (to be codified at 29 C.F.R. § 1625.6).[21]

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[19] In this way, the employer satisfies both the "reasonableness" and the "necessity" elements of the BFOQ defense. *See Usery v. Tamiami Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976). One way of satisfying these elements is to establish—as Greyhound did—that some members of the excluded class possess a trait (or traits) precluding safe and effective job performance, which cannot be ascertained by means other than reference to the applicant's chronological age.

[20] *See also Beck v. Manheim*, 505 F. Supp. 923 (E.D. Pa. 1981); *Aaron v. Davis*, 414 F. Supp. 453 (E.D. Ark. 1976); *cf. Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1770 (1982) (finding maximum hiring rule for pilots justified by "credible and persuasive" evidence that best experience for flight captain position was experience with same airline in lower-level flight job).

[21] Section 1625.6(b) of the regulations provides:

> An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals

(Footnote continued on following page)

As noted earlier, such regulations are entitled to considerable weight. *Griggs v. Duke Power Co.*, 401 F.2d 424, 433-34 (1971). We thus conclude that the magistrate did not err in requiring the City, in order to prevail on its BFOQ defense, to demonstrate *either* that all or substantially all persons over age 55 would be unable to safely and effectively perform firefighting duties, *or* that at least some employees over age 55 possess a disqualifying trait that cannot practicably be ascertained by means other than automatic exclusion on the basis of age.

IV

Finally, the City contends that, regardless of the proper legal standard, the medical and other scientific evidence adduced at trial supports its selection of age 55 as a valid BFOQ. We disagree. The only scientific evidence presented at trial was that of plaintiff's expert, Dr. Michael Pollack. Dr. Pollack, an expert in the field of physiology, testified that age affects physical fitness in a number of ways, and that a wide variety of tests are available to determine fitness on an individual basis. Dr. Pollack also testified that although fitness generally decreases with age, it is possible to significantly modify this downward trend through a planned program of physical exercise. Tr. 488. With regard to the risk of heart attack (a justification for the age 55 rule urged strenuously by the City below), Dr. Pollack stated that age is only one of nine primary risk factors, and that an individual's susceptibility to heart attack, like an in-

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[21] *continued*

> so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.

The EEOC regulation goes on to state:

> If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

Id.

dividual's general physical fitness, can be determined through individualized testing. Tr. 493-94.[22] Finally, Dr. Pollack testified that despite his extensive research in the area, he has failed to uncover any scientific evidence indicating that persons over age 55 should be terminated from physically demanding jobs such as firefighting. Tr. 498.

In defense of its mandatory retirement age, the City offered no medical or scientific testimony whatsoever. Instead, it relied upon a series of reports, made by the Wisconsin Retirement Research Committee, that chronicle the legislative history of the Wisconsin Retirement Fund Act. These reports, if anything, support the plaintiff's position here. As the magistrate found, the reports indicate that the Wisconsin Retirement Fund's choice of age 55 as a "normal retirement date" for protective service employees was not based on any scientific or medical data but, rather, was founded upon (1) a concern for public safety based upon the *subjective belief* that the aging process would take its toll particularly quickly on the physical and mental skills of these employees;[23] and (2) the need to have a definite and financially feasible age upon which a retirement benefit formula could be based.

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[22] Similar expert testimony was presented and credited heavily by the court in *Johnson v. Baltimore*, 515 F. Supp. 1287, 1298-99 (D. Md. 1981), *cert. denied*, 102 S. Ct. 1440 (1982).

[23] Thus, with regard to the selection of an appropriate "normal retirement age," the 1964 Retirement Research Committee report stated,

> Such determinations, unfortunately, must of necessity be based primarily on subjective findings; scientific evidence with respect to the aging process is simply not available to the extent necessary to permit orderly, objective analysis.

Def. Ex. B at 8. Of course, the fact that little objective, scientific data may have been available at the time the City initially set its mandatory retirement age, does not excuse the City's failure to later substantiate that age determination once such evidence became available, particularly in light of the 1974 and 1978 Amendments to the ADEA.

Indeed, with regard to this latter item, the magistrate specifically found that "[o]bviously, the cost factor and uniformity in application played dominant roles in retirement age selection." Decision and Order at 14.

These considerations are insufficient to support the City's BFOQ defense. First, it is well established that economic factors cannot be the basis for a BFOQ, since precisely those considerations were among the targets of the ADEA. *Smallwood v. United Airlines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2299 (1982); *see* 29 C.F.R. § 860.103(h) (1981) (superseded); *cf. Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 716 (1978) (cost-justification defense not available in Title VII action). Moreover, although public safety is certainly a legitimate municipal goal, the ADEA requires that the use of mandatory retirement schemes to achieve this goal be based on something more than mere speculation or the subjective belief that older employees are generally less capable of handling the rigors of a physically demanding job. As the Sixth Circuit recently stated, "[w]hen an employer seeks to justify denying employment on the basis of a BFOQ which relates to the safety of persons other than the one claiming discrimination, a particular inquiry into the effect of aging on the ability to perform safely is called for." *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 844 (6th Cir. 1982); *see supra* note 21.

We agree with the conclusion of the magistrate that no such "particularized inquiry" was undertaken in the instant case. As the magistrate stated in his decision, there is virtually no evidence in the record to indicate that the City, in setting age 55 as its compulsory retirement age, conducted "the appropriate balancing test that the policy underlying the ADEA requires. Age 55 simply represented a convenient age to select, and it was some age, any age, upon which a benefit formula could be structured." Decision and Order at 14. Moreover, the City's raising of its mandatory retirement age from 55 to 60, on July 1, 1980, further undercuts any claim that compulsory retirement of firefighters at age 55 is

necessary to the "essential operation" of the Wauwatosa fire department.

To be sure, where, as here, public safety is the "essence" of a particular employer's business, that factor obviously becomes an important occupational and legal concern. Consequently, employers whose businesses are safety-related are likely to have less difficulty than other employers in establishing that *some* retirement age below the federally protected limit of 70 qualifies as a valid BFOQ. *See, e.g., EEOC v. County of Santa Barbara*, 666 F.2d 373, 377 (9th Cir. 1982); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975). However, this does not relieve an employer from the burden of justifying the *particular* age limitation adopted—that is, from demonstrating *either* that all or substantially all members of the excluded class are incapable of safe and effective job performance, *or* that there exists no practical alternative, for purposes of determining job fitness, to compulsory retirement on the basis of chronological age. Based upon our own careful review of the record in this case, we agree with the magistrate that the City has failed to meet either of these criteria and, hence, cannot prevail on its BFOQ defense.

V

Having affirmed the magistrate's finding of liability, we turn now to the question of damages. Pursuant to 29 U.S.C. § 626(b) (1976), the magistrate in this case awarded both actual and liquidated (or double) damages.[24] The magistrate included in his award of actual damages an amount representing Orzel's lost salary and benefits from the date he was terminated until he actually returned to work on February 1, 1981. The magistrate, however, deducted from his total damage award all amounts received by the plaintiff from unemployment compensa-

[24] The text of 29 U.S.C. § 626(b) (1976) is reprinted at note 3, *supra*.

tion benefits and from retirement pension benefits. The magistrate noted that reduction of a damage award to take into account such "collateral source benefits" is normally a matter within the discretion of the district court, *see EEOC v. Sandia Corp.*, 639 F.2d 600, 624-26 (10th Cir. 1980), and stated that he saw no reason in the instant case to provide plaintiff with such double recovery for his lost employment. Decision and Order at 18, citing *EEOC v. Enterprise Ass'n Steamfitters*, 542 F.2d 579, 591 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1979). Orzel has not appealed this determination, and we agree that the magistrate did not abuse his discretion in deducting these amounts from plaintiff's damage award.

The magistrate also deducted from his total damage award the sum of $425, representing plaintiff's interim earnings as a temporary census taker. On appeal, defendant claims that Orzel's damages should be reduced much further, because Orzel, in failing to secure other full-time employment, violated his duty to mitigate damages. In support of this argument, the City relies heavily upon *Sangster v. United Airlines, Inc.*, 633 F.2d 864 (9th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981). The facts of *Sangster*, however, are not at all analogous to those of the instant case. In *Sangster*, a former airline stewardess remained unemployed for eight years after she was denied a requested transfer from a supervisory to an in-flight position because of her sex and marital status. The plaintiff in *Sangster*, after quitting her job at United, did not apply to other airlines, nor did she register with any employment agency or apply for unemployment benefits during the entire eight-year period she was out of work. Moreover, Sangster admitted at trial that she knew, during at least part of her term of unemployment, of an available supervisor's position, and, perhaps more important, that "she never even attempted to procure a job as a stewardess, the work she considered preferable to her position as stewardess supervisor." 633 F.2d at 868.

In the case before us, by contrast, a 55-year-old plaintiff who had been involuntarily retired, secured one part-

time job and applied for another, full-time, position during a two-year period.[25] The record also shows that Orzel placed his name on file with the Wisconsin Job Service in an effort to seek whatever employment was available. In light of these facts, we believe that this case is not controlled by the *Sangster* reasoning but, rather, is more analogous to this court's decision in *Sprogis v. United Airlines, Inc.*, 517 F.2d 387 (7th Cir. 1975). In *Sprogis* we held that an employment discrimination plaintiff's formal application for one job and her procurement of another, temporary, position during a two-year period constituted "reasonable diligence" in attempting to find alternative employment, and we thus rejected defendant's "failure to mitigate" argument. 517 F.2d at 392. Similarly, we agree with the magistrate that Orzel's efforts here, while perhaps "less than vigorous," did not constitute a violation of his duty to mitigate damages.

The City next argues that, in any event, it should not be held liable for any damages incurred by the plaintiff subsequent to December 18, 1979, the date on which the City first offered to reinstate Orzel.[26] Defendant's offer to reinstate Orzel, however, was expressly conditioned upon Orzel's taking and passing a physical exam arranged by the City. Orzel refused to comply with this condition on the advice of his attorney, who believed that acquiescence in the demand for a physical exam might be detrimental to the prosecution of Orzel's discrimination suit. We agree with the magistrate that, under the circumstances,

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[25] Orzel worked during 1980 as a temporary census taker. He also applied for a job with the U. S. Postal Service but was not hired.

[26] When testimony regarding this reinstatement offer was first introduced at trial, the plaintiff objected under Rule 408 of the Federal Rules of Evidence, claiming that the testimony should be excluded as an offer made in settlement of the litigation. The magistrate acknowledged that the City's offer of reinstatement was made after commencement of the instant lawsuit, but admitted the testimony as an exception to the exclusionary rule because he deemed it relevant to the issue of mitigation of damages.

it was not unreasonable for Orzel to be concerned that acceptance of the City's conditional offer would jeopardize his legal position.

At the time the conditional offer of reinstatement was made, the City had not yet agreed to stipulate that Orzel was physically capable of performing all firefighting duties, even though the plaintiff, as part of a trial procedure, had taken and "passed with flying colors" a physical exam just four months earlier, a copy of which his counsel was apparently willing to furnish the City. *See* Def. Ex. V. Moreover, the evidence shows that the City was unwilling to back up its offer of reinstatement with a written agreement to retain Orzel until at least age 60; instead, the City continued to assert that it was inclined to reterminate Orzel's employment as soon as any legal decision appeared to give it the right to do so. In addition, we note that Orzel may have had particular reason to question the City's motives in this case, since the City had earlier withdrawn a settlement offer that Orzel had apparently accepted, on the ground that the City's employment relations committee, which had extended the offer, had no authority to make binding settlement offers. *See* Record at 10, 18. Under these circumstances, we do not believe it was unreasonable for Orzel, on the advice of his attorney, to refuse the City's conditional offer to return to work. We therefore reject the City's contention that it should not be held liable for any damages accruing after December 18, 1979.

Finally, defendant argues that the magistrate erred in concluding that the City had committed a willful violation of the ADEA and, hence, in awarding liquidated damages under section 626(b) of the Act.[27] Recently, in *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149 (7th Cir. 1981), this court articulated the proper standard

[27] An award of liquidated damages under 29 U.S.C. § 626(b) (1976) essentially doubles the plaintiff's recovery of backpay and benefits. *Syvock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 151 (7th Cir. 1981).

for identifying a willful violation of the ADEA.[28] In that case, Judge Pell, writing for a unanimous panel, stated that the standard for willfulness "should focus on the defendant's state of mind at the time the allegedly discriminatory acts occurred. It must distinguish those situations in which an employer consciously discriminates against an employee from those in which the discrimination is unconscious." 665 F.2d at 155.

The *Syvock* court then held that, in order to prove willfulness under 29 U.S.C. 626(b) (1976), an ADEA plaintiff:

> must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA.

Id. at 156 (footnote omitted). In a footnote, the *Syvock* court denied that application of this standard would place an "insurmountable burden" on ADEA plaintiffs, and explained that, to meet the latter aspect of this test, a plaintiff must show (1) that the employer knew or reasonably should have known what the requirements of the ADEA were; and (2) that the employer knew or reasonably should have known that his actions towards the plaintiff were inconsistent with those requirements. 665 F.2d at 165 n.10. The court further noted that in a disparate treatment case "a finding of willfulness will generally require some direct evidence of discriminatory intent . . . or a showing that, at the time of the alleged discriminatory action, the employer was motivated to discriminate or *engaged in a pattern of discriminating*

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[28] At the time the magistrate issued his decision in the instant case, *Syvock* had not yet been decided. The magistrate therefore relied upon the standard for willfulness adopted by the Third Circuit in *Wehr v. Burroughs Corp.*, 619 F.2d 276, 280 (3rd Cir. 1980), and endorsed by the Ninth Circuit in *Kelly v. American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1981). This court, in *Syvock*, expressed its approval of the reasoning used in both *Wehr* and *Kelly*. *See Syvock, supra*, 665 F.2d at 154-56 & nn.9-10.

against older employees." Id. (emphasis supplied). Finally, the *Syvock* court stated that "[t]he determination whether the employer knew or should have known that his actions toward the plaintiff were inconsistent with the law is a determination left to the jury in the first instance." *Id.* In other words, in a trial to the court, this determination constitutes a finding of fact, to which the "clearly erroneous" standard applies. *See Pullman-Standard v. Swint*, 102 S. Ct. 1781, 1788-91 (1982) (district court's determination as to discriminatory intent is factual finding, reversible only if "clearly erroneous" under Fed. R. Civ. P. 52(a)).

Applying these standards to the facts of the instant case, we conclude that the magistrate did not err in determining that the City's forced retirement of Orzel, on December 31, 1978, constituted a willful violation of the ADEA. In reaching this conclusion, the magistrate first noted that "[a]n award of liquidated damages does not automatically flow from a proven violation of the Act, because the plaintiff need not establish the defendant's state of mind as part of his prima facie case." Rather, "[a] 'knowing and voluntary' violation of the ADEA is necessary to entitle a party to liquidated damages." Decision and Order at 21. This reasoning tracks precisely the analysis employed by the court in *Syvock*, *see* 665 F.2d at 154-56. Next, the magistrate carefully reviewed the legal and factual circumstances surrounding the plaintiff's termination in order to analyze "defendant's state of mind at the time the allegedly discriminatory acts occurred." *Syvock*, *supra*, 665 F.2d at 155. The magistrate noted that, prior to the effective date of the 1978 ADEA amendments (April 6, 1978), section 626(f)(2) of the Act arguably permitted employers to discriminate on the basis of age if such actions were taken pursuant to the terms of a bona fide retirement plan; in other words, until April 1978, the City's mandatory retirement of firefighters pursuant to the terms of the Wisconsin Retirement Fund was arguably justified under section 626(f)(2) of the ADEA. The 1978 Amendments, however, clearly and unequivocably removed this exception, and there is ample evidence in the record that the City was

indeed aware of these amendments.[25] The record also discloses that on November 15, 1978, counsel for the plaintiff advised the mayor of Wauwatosa that it was his "considered opinion after carefully researching and reviewing all prior precedents concerning this issue," that the City's demand for Orzel's mandatory retirement "is in direct violation" of the ADEA. Pl. Ex. 2 (letter from plaintiff's attorney to Mayor James A. Benz). The letter further advised the mayor of "several Federal court decisions" that had applied the ADEA's proscriptions to the mandatory retirement of local firefighters and police officers. *Id.* So far as the record reveals, the City made no response to this letter.

Moreover, as the magistrate noted, although there was no definitive law in this circuit at the time Orzel was forced to retire, the same was not true elsewhere. For example, in 1976, the court in *Aaron v. Davis*, 424 F. Supp. 1238 (E.D. Ark. 1976), held that the mandatory retirement, pursuant to local ordinance, of an Assistant and a District Fire Chief at age 62 violated the ADEA. The

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[25] For example, the City Attorney for Wauwatosa testified that, at the request of the City's employee relations committee, he made various efforts during the early part of 1978 to determine the effect of the 1978 Amendments on the mandatory retirement of local police and firefighters. *See* Tr. 379-80. Although the City Attorney initially concluded that the amendments did not change the law as it pertained to the mandatory retirement of firefighters and law enforcement personnel, he later rejected this conclusion and advised the City that

> [i]t appears rather clear that with the 1978 Amendments to the Federal Age Discrimination in Employment Act [ ] the involuntary retirement of most employees prior to reaching the age of seventy is now prohibited, even though there is a bona fide pension plan providing for mandatory retirement at an age prior to seventy.

Def. Ex. T at 1 (letter from City Attorney to Wauwatosa Employee Relations Committee, dated November 20, 1979); *compare* Def. Ex. S (letter from City Attorney to Employee Relations Committee, dated June 12, 1978).

Aaron court, in a thorough and well-reasoned opinion, explicitly rejected the defendant municipality's argument that the mandatory retirement of local firefighters at age 62 constituted a bona fide occupational qualification under section 623(f)(1) of the ADEA. 424 F. Supp. at 460-63. And in *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977), the Fourth Circuit held that Congress had not exceeded its constitutional authority in extending the proscriptions of the ADEA to state and local governments, thus addressing a constitutional defense upon which the City relied heavily at the lower court stage of these proceedings. Finally, this circuit's decision in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975), also rendered well before the effective date of Orzel's termination, should have alerted the City to the substantial evidentiary foundation necessary to establish a BFOQ defense—a foundation which the City never attempted to develop here.

In light of these factual and legal circumstances, we agree with the magistrate's implicit conclusion that the City knew or reasonably should have known of the requirements of the ADEA and that the City knew or reasonably should have known that its termination of Orzel was inconsistent with those requirements. *Sywock*, *supra*, 665 F.2d at 165 n.10:

> The defendant in terminating plaintiff did not proceed in ignorant bliss. It knew, or should have known, that the 1974 amendments to the ADEA had been held to apply to local government as regards its protective occupation employees. The same would be true for the 1978 amendments. The defendant did not proceed maliciously, but it proceeded upon the calculated belief that the decisions in other areas of the country would either be found to be erroneous or not applicable in this circuit.
>
> The defendant should not be able to avoid the imposition of liquidated damages by either closing its eyes to the 1978 amendments or by choosing legal advice more palatable to its position.

Decision and Order at 23. Moreover, even if reasonable minds could differ on this issue, we could not, pursuant to the applicable standard of review, characterize the district court's determination of willfulness as "clearly erroneous" under Federal Rule of Civil Procedure 52(a). *See Pullman-Standard v. Swint, supra*, 102 S. Ct. at 1791. We also note that, in the course of his deliberate and balanced analysis, the magistrate *disallowed* several items of claimed compensation at the same time as he *allowed* liquidated damages. *See* pp. 23-24 *supra*.

CONCLUSION

For the reasons discussed above, we affirm the magistrate's conclusion that the City's age 55 mandatory retirement rule for firefighters does not constitute a valid BFOQ under section 623(f)(1) of the ADEA. We also affirm the magistrate's finding of a willful violation of the Act, and uphold the resulting award of damages in all respects.

AFFIRMED.

PELL, *Circuit Judge*, concurring.

I am persuaded by Judge Cudahy's well-reasoned opinion, and my own participation in reading the briefs and hearing oral argument that a proper result has been reached in this case. I therefore concur in his opinion.

Nevertheless, I deem it appropriate to comment on what I regard as some of the troublesome aspects of this case. If I were viewing the matter of whether compulsory retirement of fire fighters at the age of 55 was a bona fide occupational qualification (BFOQ) as a matter of first impression, rather than, as we must, in the context of well established law, I might have been inclined to say that it was a reasonably necessary BFOQ.

I am not impressed by the fact that there had been no major fires in Wauwatosa in many years. There is no crystal ball to foretell when catastrophe will pay a visitation. It can and does happen. The fire department should be prepared to cope, having for that purpose adequate equipment and corps of physically and mentally able fire fighters.

Judge Cudahy's opinion refers to "the degenerative and hard-to-detect physical and sensory changes which begin in a person's late thirties and progress steadily thereafter." This is a fact of life and pointing out the Bernarr Macfaddens who exist does not refute it. It is simply a part of the aging process. Not only does a fire fighter have to be prepared to engage in strenuous physical activity but he or she must have the reaction timing of a young person. Quick decisions, indeed quick intuitive reactions, followed by accelerated action can be required.

It can't be argued, I believe, that these degenerative processes do not apply with some degree of equality to all of the physiological and psychological aspects of a human being. These include the respiratory system. From newspaper reports of fires, oftentimes not a major fire in a residence, we know the cause of fatalities frequently is asphyxiation rather than incineration. I am not unmindful that fire departments ofter have a rule that its fire fighters not enter a burning structure without wear-

ing gas masks. Yet, we know also that fire fighters as well as occupants are sometimes overcome by the deadly fumes released by certain combustible materials.

We, however, are not considering the matter on an a priori basis. As Judge Cudahy's opinion correctly points out, the burden is on the employer to demonstrate that the BFOQ is reasonably necessary to the normal operation of the particular business. This, Wauwatosa, despite its protestations to the contrary, simply has failed to do. Judge Cudahy's opinion refers to federal fire fighters as "a wholly different group of employees, operating under different working conditions and performing significantly different job functions." It strikes me that "a rose is a rose is a rose" might be applicable here but Wauwatosa has failed to demonstrate any nexus between the federal and municipal fire fighters' situation, nor that Congress implicitly intended to include *all* fire fighters in those to be treated in the BFOQ category.

The setting of a retirement age as a BFOQ in certain occupations would seem to be a permissible governmental objective and in the case of fire fighters this would relate both to the citizens of the community and the fire fighters themselves. Wauwatosa has failed to demonstrate that this age should be 55.

I am also troubled by the matter of not stopping the assessment of damages as of the date when Orzel was offered reinstatement. It seems to me that the condition of taking a physical examination prior to his reassuming the potentially arduous duties was not an unreasonable one. If he had been offered unconditional reinstatement, I would assume that he would have been subject to periodic required physical examinations. In view, however, of all of the peculiar circumstances in this case, as outlined in Judge Cudahy's opinion, I am unable to state that the result reached was incorrect.

Finally, the matter of allowing liquidated damages is always a difficult area in application. Congress clearly did not intend, as it did in other areas such as the Fair Labor Standards Act, this to be an automatic doubling.

The present case, in view of the then less settled law, and the recent inclusion of municipalities strikes me as a close case on liquidated damages; nevertheless, I think the opinion of Judge Cudahy correctly applies the principles of *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149 (7th Cir. 1981).

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APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Aug. 31, 1981

Case No. 79-C-444

STANLEY ORZEL,

Plaintiff

v.

CITY OF WAUWATOSA FIRE DEPARTMENT,

Defendant.

DECISION AND ORDER

This is an action brought pursuant 28 U.S.C. §1337 and 29 U.S.C. §626(c). The court's jurisdiction under the foregoing sections was properly invoked, and both parties consented in writing to the magistrate's civil trial jurisdiction pursuant to 28 U.S.C. §636(c)(1).

The plaintiff Stanley Orzel claims that the defendant City of Wauwatosa Fire Department violated his rights under The Age Discrimination in Employment Act (ADEA) by mandatorily retiring him at 55 years of age. On February 11, 1981, the trial of this action commenced. At its conclusion, the parties filed post trial briefs, and oral argument was entertained on July 15, 1981. The case is now ready for disposition and the following shall constitute the court's findings of fact and conclusions of law in accordance with Rule 52, F.R.C.P.

I. INTRODUCTION

The plaintiff is an adult resident of Wauwatosa, Wisconsin. He was born on October 24, 1923. In 1949, he was hired by the defendant and proceeded through the ranks until reaching the position of Assistant Chief in 1970. He held that position on October 24, 1978, when he attained the age of 55.

The City of Wauwatosa is a municipal corporation located in the State of Wisconsin. It has a municipal goverment comprised of an elected common council and a mayor. The city also maintains a Fire and Police Commission and an employee relations committee.

On December 31, 1978, pursuant to Wis. Stats. §41.02 (23), as incorporated by Wauwatosa Ordinance 2.78.010, the plaintiff was mandatorily retired. The law in effect at the time provided for the normal retirement of protective occupation employees at age 55. Plaintiff then became eligible for full retirement benefits pursuant to the terms of the Wisconsin Retirement Fund.

Plaintiff filed a request for an extension of employment beyond age 55 with the City's employee relations committee, but that request was denied. After pursuing the administrative steps required under the ADEA, plaintiff commenced this lawsuit seeking compensatory and liquidated damages.

The parties stipulated that Stanley Orzel is "physically and mentally in excellent condition and good health and that no claim is made that he personally was not capable of performing all fire department functions." It is the defendant's contention that the ADEA, if construed to apply to a municipality, is an unconstitutional intrusion by the federal government upon a state government. The

defendant also contends that, if the ADEA is held to be applicable, age 55 is a bona fide occupational qualification (BFOQ), as that term is used in 29 U.S.C. §623 (f)(1).

The threshhold legal issues can be summarized as follows:

1. Were the 1974 amendments to the ADEA, which added state and local governmental employees to its coverage, and the subsequent 1978 amendments, promulgated by Congress pursuant to its authority under the Commerce Clause (Article I, §8 cl. 3) or by virtue of §5 of the Fourteenth Amendment?
2. If Congress exercised its powers under the Commerce Clause, does the ADEA as amended, constitute an unreasonable intrusion upon integral state or local government functions?
3. If Congress exercised its powers under the Fourteenth Amendment, does age 55 for fire department employees qualify as a BFOQ?

Only after the foregoing issues are resolved can the other questions raised in this action such as liability, willfulness, damages and mitigation of same be addressed.

II. HISTORY OF ADEA AND AMENDMENTS THERETO

The ADEA was enacted on December 16, 1967, and became effective June 12, 1968. Its purpose was to prohibit arbitrary age discrimination in employement. See 29 U.S.C. §621(b). Initially, the Act covered only employees in private industry, and as such, congressional authority need only have been based on the Commerce Clause. In fact, the statutory language of 29 U.S.C. §621(a)(4) implies as much. A comparison can be made

with the Civil Rights Act of 1964, which was similarly applied to private industry on the basis of the Commerce Clause.

In 1974, Congress amended the Fair Labor Standards Act (FLSA) in several respects. One of the sections pertained exclusively to the ADEA and extended its scope of coverage to federal, state and local employers. Section 28, Pub. L. 93-259 (April 8, 1974).

> "Congress expanded the scope of ADEA in 1974 to include state, local, and federal government employers. State and local governments were added as potential defendants by a simple expansion of the term 'employer' in the ADEA. The existing substantive and procedural provisions of the Act . . . were thereby extended to cover state and local government employees." *Lehman v. Nakshian,* 49 USLW 4835, 4838 (June 26, 1981).

In 1978, further amendments to the ADEA raised the protected age from 65 to 70 and removed a permissible exclusion based upon a bona fide employee retirement plan. Pub. L. 95-156 (April 6, 1978).

As stated earlier, the crux of the issue facing this court is a determination of whether Congress was acting pursuant to Section 5 of the Fourteenth Amendment when it amended the ADEA. The legislative history fails to reveal any specific pronouncement of Congress in this regard and thus, other sources must be utilized to ascertain the intent of Congress. For this purpose, it is appropriate to refer to committee reports, analagous legislation and contemporaneous judicial construction of existing law.

The question is not novel. Recently, two courts were called upon to review the legislative history of the ADEA

and reached opposite conclusions regarding the invocation of the Fourteenth Amendment by Congress. In this district, Judge Terence Evans in the case of *EEOC v. County of Calumet,* Case no. 81-C-402 (E.D. Wis. June 12, 1981), concluded that Congress did intend to exercise its Fourteenth Amendment power in enacting the 1974 and 1978 amendments. Judge Evans went on to state that even if the 1978 amendments were enacted pursuant to the Commerce Clause, there is no valid state or local governmental function or policy to be served by discriminating on the basis of age and thus, there is no unreasonable federal instrusion.

In his opinion, Judge Evans excerpted from committee reports statements illustrating a Congressional intent to treat this form of discrimination in the same manner as other forms, *i.e.* race, religion or sex. For example,

> "As the President said in his message of March 23, 1972, supporting such an extension of coverage under the ADEA, 'Discrimination based on age — what some people call ageism — can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily defined group. Especially in the employment field, discrimination based on age is cruel and self-defeating; it destroys the spirit of those who want to work and it denies the Nation the contribution they could make if they were working." Id. at p. 7 quoting 1974 U.S. Code, Cong. and Admin. News, p. 2849.
>
> "From the evidence presented, the committee concludes that 'age' should be as protected a classification as race and sex. The argument that everyone ages and no particular group is singled out for discrimination ignores the fact that discrimination solely on the basis of age is wrong. If mandatory

> retirement because of age — the first step in the practice of age discrimination — is not to be declared unconstitutional by the Courts, then Congress should act to make such a practice illegal. Any compelling argument for mandatory retirement must be balanced against the cost such retirement exacts in the lives of elderly persons, and the arguments in favor of mandatory retirement do not justify the existence of this discriminatory practice." Id. at p. 8 quoting "Forward", August, 1977 Report by the Senate Committee on Aging, "Mandatory Retirement: The Social and Human Cost of Enforced Idleness."

The fact that Congress, or certain members thereof, viewed the problem of age discrimination in a similar light with that of other forms is not singularly persuasive on the present issue, but it does lend credence to the position that Congress intended to act as it had with the Civil Rights Act of 1964. There, Congress utilized its Fourteenth Amendment power in prohibiting state governments from discriminating on the basis of race, color, religion, or national origin.

On the other hand, legislative history, like statistics, is suspectible of varying readings and can be utilized to support opposite conclusions. In *EEOC v. State of Wyoming*, No. C80-0336B (D. Wyo., May 22, 1981), the district judge concluded that Congress did not intend to rely on its Fourteenth Amendment power. In that case, Judge Clarence Brimmer states,

> "There is not a word or even a smidgen in the 1974 amendments to the ADEA or the legislative history of the amendments supporting the contention that Congress was exercising its powers under the Fourteenth Amendment. To the contrary, the policies reflected by the amendments are exclusively couched in terms of commerce." Id. at p. 10.

The next appropriate area to consider is that of analagous legislation. Here again, divergent paths can be chosen. One can take the path of the Civil Rights Act of 1964 or that of the Fair Labor Standards Act. As to the latter, the court in *National League of Cities v. Usery*, 426 U.S. 833 (1976), determined that the extension of the FLSA to the states was pursuant to the power of the Commerce Clause.

In addition, it has been argued that Congress did not intend ADEA coverage to extend to protective agencies of the states since, in 1974, it passed a law requiring federal protective employees to retire at age 55. 5 U.S.C. §8335(b). The defendant argues that it would be totally inconsistent for Congress to act one way as regards its own employees, but require the states to act in an opposite fashion.

To this point, the opposing arguments attempting to decipher congressional intent are equally persuasive. However, in the opinion of this court, the balance is tipped by judicial construction, and the congressional acquiescence to same, which occurred in the period between 1974 and 1978. Following the 1974 amendment, courts were faced with identical issues. The conclusion in these cases was that Congress intended to exercise its Fourteenth Amendment power. See, *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977); *Remmick v. Barnes*, 435 F.Supp. 914 (D.N.D. 1977); *Aaron v. Davis*, 424 F. Supp. 1238 (E.D. Ark. 1976); *Usery v. Bd. of Education*, 421 F.Supp. 718 (D. Utah 1976).

Congress was no doubt aware of this judicial construction at the time it passed the 1978 ADEA amendments. Its reports comment on the construction given the FLSA in *National League of Cities*, supra, and also acknowl-

edge cases construing the ADEA. Notwithstanding the actual awareness of Congress, that legislative body has been held to be presumptively aware of judicial construction. See *Shapiro v. United States,* 335 U.S. 1 (1948).

> ". . . in interpreting the legislative history of a statute, there is a presumption that Congress was aware of the judicial construction of existing law." *United States v. Professional Air Traffic Controllers Orig., et al,* No. 80-2854, (7th Cir., June 18, 1981), at p. 6.

Therefore, in 1978, when Congress voted to remove the retirement plan exclusion and make other amendments to the ADEA, it had an opportunity to explicitly reject prior judicial construction and curtail such similar construction in the future. It could have specifically expressed its intent to act solely under the Commerce Clause.

In ascribing an unstated intent to Congress, this court is mindful of the caution set forth in *Pennhurst State School and Hospital v. Halderman,* 49 U.S.L.W. 4363, 4367 (April 20, 1981), where the Supreme Court stated,

> "Because such legislation imposes congressional policy on a state involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."

The Supreme Court went on to state that the case for inferring intent is weakest when affirmative obligations are imposed on the state as opposed to simply prohibiting certain kinds of state conduct. The ADEA prohibits conduct: to not engage in arbitrary age discrimination in employment. The *Pennhurst* caution will not, in this case, prohibit a conclusion favoring Fourteenth Amendment intent.

Concerning the defendant's argument that Congress itself pointed the direction when it enacted 5 U.S.C. §8335(b), this court believes otherwise. An analysis of that statute simply reveals that §8335(b) is a statement that age 55 is a bona fide occupational qualification for federal firefighters or law enforcement officers. Similarly, §8325(a) and (c) establish different ages for air traffic controllers and certain other federal employees. This statute is consonant with 29 U.S.C. §623(f)(1) permitting age discrimination where there is a bona fide occupational qualification.

At the oral argument, defendant further contended that since the ADEA incorporates the enforcement scheme of the FLSA, it is more closely analagous to that statute and thus falls only under the Commerce Clause power. Cited in support of this argument was *Lehman v. Nakshian*, supra.

The question in *Lehman* was whether a federal employee had a right to a jury trial in an ADEA action. As to federal employees, Congress chose to follow a statutory scheme based not on the FLSA, but on Title VII which does not permit a right to trial by jury. See *Lehman*, supra at 4838. In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Supreme Court stated that Congress may determine appropriate legislation for enforcing the Fourteenth Amendment and in so doing, may provide for suits against the states which are impermissible in other contexts.

Therefore, the fact that the ADEA is referenced to the FLSA for enforcement in the non-federal sector does not materially advance the issue at hand. Enforcement schemes are not relevant. What is relevant is the underlying purpose of the Act, certainly, the purpose of the

ADEA has a closer kinred spirit to Title VII than it does to the FLSA.

It is the conclusion of this court that the 1974 and 1978 amendments to the ADEA were enacted under the authority given Congress pursuant to Section 5 of the Fourteenth Amendment. Having reached this conclusion it is not necessary to address the Commerce Clause question of whether or not the ADEA is an unreasonable intrusion upon integral state governmental functions. Parenthetically, this court concurs with Judge Evans in *EEOC v. County of Calumet*, supra. The establishment of a retirement system, such as the Wisconsin Retirement Fund, is an appropriate state function. In fact, present Wisconsin law §41.11(1), Wis. Stats. forbids forced retirement where "prohibited by federal law." This is a recognition that the overlay of the ADEA upon the state system is not, in and of itself, an unreasonable intrusion.

Thus, the more appropriate question is whether the state and local system can require mandatory retirement before the protected age. The ADEA permits that under certain circumstances, and this court now turns its attention to the issue of a BFOQ.

III. AGE 55 AS A BONA FIDE OCCUPATIONAL QUALIFICATION

Before the question of BFOQ is reached, the plaintiff is required to prove a prima facie case of age discrimination. There is no dispute in this case that the defendant terminated plaintiff's employment solely on the basis of his age even though plaintiff was physically and mentally capable of performing all required job functions.

Thereafter, the allocation of burdens and presentation of proof should follow the model set forth in *McDonnell*

Douglas Corp. v. Green, 411 U.S. 792 (1973), and subsequently addressed in *Texas Department of Community Affairs v. Burdine*, 49 U.S.L.W. 4214 (March 4, 1981). Although both of those cases were brought pursuant to Title VII, their guidelines have been held to be applicable to the ADEA. See *Sutton v. Atlantic Richfield Co.*, 25 F.E.P. Cases 1619 (9th Cir. 1981).

Once the plaintiff has proven his prima facie case, the burden shifts to the defendant to set forth some legitimate, non-discriminatory reason; if the defendant carries this burden, the plaintiff must prove that the reasons offered by the defendant were not legitimate but merely a pretext for discrimination. *McDonnell Douglas Corp.*, supra.

In the context of this case, the defendant has attempted to satisfy his burden in accordance with the exception under §633(f)(1) of the Act which states, in part, as follows:

> "(f) Lawful practices — Age an occupational qualification. . . It shall not be unlawful for an employer . . .
>
> (1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification *reasonably necessary to the normal operation of the particular business. . .*" (emphasis supplied).

The foregoing defense requires defendant to show:

(1) That the BFOQ is reasonably necessary to operating an efficient fire department in Wauwatosa, Wisconsin; and

(2) That the defendant has reasonable cause, a factual basis, for believing that all persons within the class would be unable to perform the duties of the job safely and efficiently, or that

> it is impossible or impracticable to deal with persons over the age limit on an individualized basis.

See *Johnson v. Mayor and City Council of Baltimore*, 26 F.E.P. Cases 44, 50 (D.Md. 1981). The evidence in this case has been directed at attempting to establish element one and the first alternative of element two, *i.e.* that there is a factual basis for disqualifying all persons within the over age 55 class. The "class" involved is that of all firefighters as opposed to a more limited class such as assistant chiefs. This is in accord with *EEOC v. City of Janesville*, 630 F.2d 1254 (7th Cir. 1980).

At this juncture, it is necessary to further elaborate on the evidence presented on this issue. The City of Wauwatosa covers approximately 13 square miles and has 51,600 residents. Forty percent of its tax base is either industrial or commercial with various warehouses, manufacturing plants, hotels and major commercial areas located within its borders.

The City's full-time fire department has responsibility for the foregoing together with responsibility for certain Milwaukee County institutions. In order to discharge its responsibilities, the department employes 126 firefighters of various ranks. It was clear from the testimony that one of the most important duties of the department is to maintain a "level of readiness." This readiness level must be maintained whether the department responds to five calls or 15. Viewing the firefighters as a class, there is no doubt that a substantial portion of the work is physical.

The city by ordinance adopted the retirement system for public employees established by the State of Wisconsin and set forth in Chapter 41 of the Wisconsin statutes.

The City contributes a percentage of its payroll to the Wisconsin Retirement Fund for its employees. Section 2.78.010 of the City ordinances require protective occupation employees to retire in accordance with the applicable Wisconsin law. Section 41.02(23), Wis. Stats., at the time plaintiff was retired, mandated the normal retirement date at age 55 for protective occupation employees. Protective occupations are described in §41.02(11).

The City ordinance does permit the Common Council discretion to extend the service of a protective occupation employee beyond the compulsory retirement age, but *only* if that employee needs additional service time to obtain eligibility for full retirement benefits. Plaintiff applied for a general extension, but was denied since he had obtained eligibility for full benefits. Several other firefighters, and policemen, prior to 1979, were granted extensions, but only for the aforementioned reason.

In addition to the normal cost factors in operating and maintaining a fire department, the defendant presented testimony of its actual and potential cost exposure under §66.191, Wis. Stats. This law provides that firefighters who develop heart or respiratory ailments are to be compensated at one-half their pay for the balance of their lives. Payment under this law is the City's responsibility. Section 66.191 has no age requirement, but it was the defendant's position that the likelihood of such ailments increases with age.

In further support of its position, the defendant through the testimony of Blair Testin, presented eight reports prepared by the Wisconsin Retirement Research Committee. Mr. Testin has been the committee's staff member since 1973. The committee makes its various recommendations to the Wisconsin legislature on the

basis of these staff reports. The reports were offered by the defendant as evidence that the mandatory retirement age of 55 is a BFOQ as established by the Wisconsin legislature. Although more detailed comment on these reports will be made later, the legislature considered the interest of public safety in determining that protective personnel should retire at an earlier age. 1974 RRC report (defendant's exhibit E).

Based upon the evidence presented, there is no doubt that a bona fide occupational qualification can be established for firefighters and, in particular, for the Wauwatosa Fire Department. This court concludes that the defendant has established the right to rely upon a BFOQ in accordance with 29 USC §623(f)(1). The defendant has established that the duties of the job, the required "level of readiness" confirms that a mandatory retirement policy at less than the federally protected age is reasonably necessary for the operation of an efficient department. This conclusion, however, does not mean that any age qualifies as a BFOQ. The particular question is whether the defendant has satisfied its burden in showing that age 55 is a BFOQ. To that inquiry we now turn.

Federal firefighters, as mentioned earlier, are required to retire at age 55, but can be extended to age 60 by the head of the agency if "the public interest so requires." 5 U.S.C. §8335(b). The fact that age 55 is a BFOQ for one group of firefighters does not automatically mean that it is for another. In the case of *Beck v. Borourgh of Manheim,* 24 F.E.P. Cases 1300 (E.D. Pa. 1981), the court recognized that such a determination can vary depending on the particular circumstances of the department.

In *Johnson v. Mayor and City Council of Baltimore*, supra, the court was faced with an identical question. After receiving extensive testimony, including medical testimony, the court ruled that the defendants failed to establish their burden of showing that ages 55 or 60 were a BFOQ for firefighters. Therefore, reference to what some other governmental units have done is not particularly persuasive. Different cities have done is not particularly persuasive. Different cities have different mandatory retirement ages as the court noted in *Johnson*, supra at p. 52,

> "A survey of the mandatory retirement ages of fire department personnel in thirty of the largest cities in the United States indicates that only four cities have a mandatory retirement age of sixty. Twenty-two cities have a retirement age of sixty-five or older or have no mandatory retirement age at all for firefighters."

This case must be judged upon its own particular facts to determine whether the selection of age 55 as the mandatory retirement age fits within the purposes of the ADEA. Does that age strike an appropriate balance of the right of the individual firefighter to continue working, despite his age, against the risk to the public safety? If it does, it qualifies as a BFOQ under §626 (f)(1).

How did the defendant come to select age 55? It is clear that the City of Wauwatosa made no independent evaluation; it simply adopted the state law regarding retirement of public employees. How did the Wisconsin legislature arrive at this age for protective occupation employees? The evidence is contained within the staff reports of the Retirement Research Committee (RRC); these reports chronical the legislative history of the Wisconsin Retirement Fund.

As early as 1962, there was a recognition that protective service employees must maintain their physical and mental skills, but that little was known of the aging process. 1962 RRC report at p. 5 (defendant's exhibit A). The 1964 RRC report lists those employment classifications which require, in the public interest, retirement at earlier than the normal age. However, as to the appropriate age level, the report states,

> "Such determinations, unfortunately, must of necessity be based primarily on subjective findings; scientific evidence with respect to the aging process is simply not available to the extent necessary to permit orderly, objective analysis." Id. at p. 8 (defendant's exhibit B)

The 1967 report (defendant's exhibit C) contains the results of a national survey which indicated that age 55 was the normal retirement age for 81 percent of the police and fire departments surveyed. The 1972 report (defendant's exhibit D) contains the results of a survey of the nation's 100 largest cities. Fifty-nine percent of the fire departments had established the age for normal retirement between 50 and 55. 1972 RRC report at p. 33. The 1974 RRC report (defendant's exhibit E) recommended that age 55 was the proper normal retirement age. This was in conformance with earlier legislation which was to become effective on July 1, 1974.

It is readily apparent from a reading of the various reports and surveys that the attempt to arrive at a proper retirement age for protective occupation employees had two major purposes. First, there was the concern for public safety based upon the subjective belief that the aging process would take its toll upon the physical and mental skills of those employees. Second, was the need to have a definite age upon which a retirement benefit formula could be based.

The second reason was a cost factor and of equal importance with the first. Once the age was determined, numerous and various types of employees were then placed in the protective category. There are now 12,000 protective employees under the Wisconsin Retirement Fund as Mr. Testin stated. The definition of "protective occupation participant" has expanded from policemen, firemen and conservation wardens to the present statute, §41.02(11), which includes, inter-alia, state correctional-psychiatric officers and state investigators. The foregoing should not be construed to denigrate the skill level needed for these various jobs, but it is difficult to believe that concerns over public safety require an identical early retirement age for all. This can be contrasted with federal law which sets different ages for different types of work. See 5 USC §8335. Obviously, the cost factor and uniformity in application played dominant roles in retirement age selection.

It is the opinion of this court that the Wisconsin legislative history is not sufficient to satisy defendant's burden that age 55 is a BFOQ. There is a lack of evidence to convince this court that the selection of age 55 represented the appropriate balancing test that the policy underlying the ADEA requires. Age 55 simply represented the majority viewpoint based on the surveys conducted. It was a convenient age to select and, it was some age, any age, upon which a benefit formula could be structured. There is not a scintilla of evidence to relate age 55, as opposed to ages 50 or 60, to the public interest and safety.

Such a conclusion may be harsh on the legislature and its designated committee which was operating within a scientific and medical vacuum. As noted in the early

reports, no such knowledge other than subjective belief, was available. However, this does not excuse the failure to later substantiate the determination with such evidence when it became available. Such efforts would have certainly dissuaded one from concluding that cost factors i.e., a retirement formula were paramount.

The medical evidence presented in this case does not support age 55 as a BFOQ. Dr. Michael Pollack, an expert in the area of physiology, testified that age affects physical fitness in many ways and that tests are available to judge an individual's fitness. He acknowledged that there is always a downward trend as age increases but this does not necessarily mean that a younger person will always outperform his elder.

Dr. Pollack further stated that for the general population, 53 percent of all deaths resulting from cardiovascular problems occur at age 55 and older. However, he indicated that age is only one of nine factors in determining the risk of heart disease. He testified that, based on his extensive research, he has failed to uncover any scientfiic evidence that persons should be terminated at age 55 for physically demanding jobs.

Concerning heart or respiratory ailments, the defendant indicated its concern with exposure under §66.191, Wis. Stats. If employees who were permitted to work beyond age 55 were more susceptible to these problems, the City would bear the financial burden of both disability and retirement payments. This legitimate financial concern, however, does not support the contention that age 55 is a BFOQ. Section 66.191 has no age tie-in, it simply declares benefits. There is nothing to preclude the legislature from modifying §66.191 in a variety of ways to lessen or prevent its alleged onerous burden on the cities.

The ADEA is a remedial statute and exceptions such as those permitted in §623(f)(1) are to be narrowly and strictly construed. *Sexton v. Beatrice Foods Co.*, 630 F. 2d 478 (7th Cir. 1980); *Johnson*, supra at p. 51. The defendant has failed to establish that *age 55* is reasonably necessary to operate an efficient fire department or that all persons within the class would be unable to perform their duties. It is not a BFOQ and defendant has violated the ADEA by forcing plaintiff's retirement at age 55.

IV. DAMAGES

Plaintiff claims actual damages, liquidated damages and damages for mental distress or pain and suffering. The defendant contends that certain items should be considered in mitigation or reduction of damages. The defendant further states that neither liquidated damages nor damages for pain and suffering should be permitted.

A. ACTUAL DAMAGES AND MITIGATION

The parties have stipulated that the following constitute the benefits which would have been received by the plaintiff had he not been forced to retire:

1979

SALARY	$23,463.06
LONGEVITY PAY	300.00
HEALTH INSURANCE	1,380.00
CLOTHING ALLOWANCE	225.00
LIFE INSURANCE	108.00
WRF CONTRIBUTION	5,589.22
TOTAL	$31,065.28

1980

SALARY	$25,574.72
LONGEVITY PAY	300.00
HEALTH INSURANCE	1,380.00
CLOTHING ALLOWANCE	225.00
LIFE INSURANCE	108.00
WRF CONTRIBUTION	5,924.64
TOTAL	$33,512.36

1981

TOTAL	$ 2,792.70

On February 2, 1981, the plaintiff returned to work as as assistant fire chief. His return was pursuant to an agreement with the defendant that the issue of damages would be left to the court.

Upon his retirement, the plaintiff began receiving the sum of $1,243.69 per month in retirement benefits. He also received unemployment compensation in the total amount of $4,982.00. In addition, for a brief period of time, he worked as a census taker and earned $423.70.

The defendant first maintains that any damages to which the plaintiff is entitled should cease as of December 18, 1979, the date on which defendant offered to reinstate the plaintiff. When testimony regarding reinstatement was first offered during the trial, plaintiff objected under Rule 408, Federal Rules of Evidence, claiming the evidence should be excluded as an offer in settlement of the lawsuit. While it is true that the offer came after the commencement of the lawsuit, the testimony was admitted as an exception to the rule. Since mitigation of damages is an issue in the case, any evidence regarding reinstatement is relevant.

Defendant's offer to reinstate was conditioned on plaintiff being required to take a physical exam to see if "he is physically able to perform such duties." (Defendant's exhibit U). Plaintiff refused on the advice of his attorney in the belief that acquiescence to the condition of a physical exam might prove detrimental to the prosecution of his lawsuit.

Plaintiff was forced to retire solely on the basis of his age without regard to his physical condition. The defendant states that it was proper to require a physical as a condition of return since plaintiff had not performed any firefighting duties for a year. Furthermore, the department requires all employees who are to receive extensions beyond retirement age to take a physical.

The defendant only conditionally offered to allow plaintiff to return to the status quo. Had defendant not forced plaintiff to retire, he would not have been required to take a physical. Plaintiff had requested an extension, but defendant rejected same, so the physical exam under those circumstances is not applicable. If extended, an employee's job continues without interruption. Here, plaintiff did not enjoy the benefit of job continuation. In addition, at the time the conditional offer was made, the parties had not stipulated that plaintiff was physically able to perform his duties. It was reasonable for plaintiff to be concerned about jeopardizing his legal position.

A plaintiff should not be required to mitigate his damages at all costs. Under the attendant circumstances, plaintiff's refusal was justified and damages should not cease as of the date of the conditional reinstatement offer.

B. UNEMPLOYMENT COMPENSATION AND RETIREMENT FUND BENEFITS

The defendant next maintains that the amount of money plaintiff received by way of unemployment compensation benefits and pension benefits should be deducted from any award of damages. 29 U.S.C. §626(b) offers little direction on this issue. It simply says that the court shall have jurisdiction to "grant such legal or equitable relief as may be appropriate to effectuate the purposes of the Act. . ."

The prevailing view is that the matter is within the discretion of the district court. *EEOC v. Sandia Corp.*, 639 F.2d 600 (10th Cir. 1980). Cases can be found going both ways. Under the collateral source rule, benefits received by an injured party from a source entirely independent of the wrongdoer should not be deducted from the damages the wrongdoer otherwise would be compelled to pay.

In this case, it cannot be said that unemployment compensation and pension benefits are "entirely independent" of the defendant because the City of Wauwatosa contributes to the Wisconsin Retirement Fund and also to the state unemployment compensation fund.

Even if these monies could be truly classified as collateral source benefits, it seems that their allowance would subvert the purpose of the Act. The purpose of a backpay award is to make the employee whole, to restore him to the position he would have been in had he not been a victim of the discriminatory act. Had plaintiff not been terminated, he would not have received the benefits in question. *Rodriguez v. Taylor*, 569 F.2d 1231 (3rd Cir. 1977), cert. den. 436 U.S. 913 (1978).

This court agrees with the position taken in *EEOC v. Enterprise Association Steamfitters*, 542 F.2d 579, 591

(2nd Cir. 1976), cert. den. *Rios v. Enterprise Association Steamfitters,* 430 U.S. 911 (1979), where the court said,

> ". . . We see no compelling reason for providing the injured party with double recovery for his lost employment; no compelling reason for deterence or retribution against the responsible party in this case; and we are not in the business of redistributing the wealth beyond the goal of making the victim of discrimination whole."

Amounts received by the plaintiff from unemployment compensation benefits and from retirement pension benefits should be deducted from his award.

C. INTERIM EARNINGS

The plaintiff testified that following his termination he worked one month as a census taker. He also applied for a job with the U.S. Postal Service, but did not receive it. Unlike cases under Title VII, the ADEA does not specifically mandate a set-off for interim earnings.

Nevertheless, the reason for a set-off here is even stronger than with the previously discussed benefits. The other employment certainly could not have been performed by the plaintiff had he retained his job with the fire department. The award of backpay in ADEA cases is to be set off by the amount of interim earnings. See *Rodriguez,* supra.

The defendant claims that plaintiff failed to meet his duty to mitigate damages and cites the case of *Sangster v. United Airlines,* 633 F.2d 864 (9th Cir. 1980), cert. den. 101 S.Ct. 2048 (1981). The different factual situations of the two cases are readily demonstrable. There, the plaintiff has the opportunity to secure a similar job, but remained idle for eight years. Here, the 55 year old plaintiff secured a part-time job and applied for another during a two year period.

Based upon the testimony, the plaintiff's efforts to mitigate his damages with interim earnings were less than vigorous. These efforts, or the lack thereof, do not, however, constitute a failure of a duty to mitigate. The plaintiff's award will be reduced by the amount of his interim earnings.

D. PAIN AND SUFFERING

There is a split of legal authority between circuit and district courts on the issue of whether damages for pain and suffering should be awarded to plaintiff in an ADEA action.

All circuit courts that have addressed the issue have responded in the negative. These courts have reasoned that the statutory scheme of reinstatement, lost wages and benefits, liquidated damages and attorneys fees are sufficient to make the plaintiff whole. See *Kelly v. American Standard, Inc.*, 640 F.2d 974, 983 (9th Cir. 1981) for a list of circuit court citations. The Court of Appeals for the Seventh Circuit has not as yet addressed this issue.

Several district courts have reached the opposite conclusion. See, e.g., *Wise v. Olan Mills, Inc.*, 485 F.Supp. 542 (D. Colo. 1980). In this district, there is a lack of unanimity. In the cases of *Morton v. Sheboygan Memorial Hospital*, 458 F. Supp. 804 (E.D. Wis. 1978) and *Buchholz v. Symons Manufacturing Co.*, 445 F.Supp. 706 (E.D. Wis. 1978), pain and suffering damages were declared an appropriate form of relief. The opposite conclusion was reached in *Jaeger v. American Cyanamid Co.* 442 F.Supp. 1270 (E.D. Wis. 1978).

As mentioned earlier, the language of §626(b) is ambiguous. Certainly, damages for pain and suffering could be within the ambit of "such legal or equitable relief as may be appropriate." The statute gives the court broad remedial powers.

After a consideration of the opposing views, it is the opinion of this court the damages for pain and suffering may not be awarded under the ADEA. The other items of damage allowed a successful plaintiff, including liquidated damages and attorney fees, are certainly sufficient to make plaintiff whole, which is the remedial purpose of the Act.

Cognizant of the fact that this issue is not settled in this circuit, the question of damages for pain and suffering will still be addressed. The plaintiff testified that he did not want to retire, that he found his work challenging and satisfying. He said that his forced retirement proved a constant source of embarrassment and irritation. His wife testified that his disposition changed after the discharge and that he became nervous and irritable.

It is the plaintiff's burden to establish, by a preponderance of the evidence, that he is entitled to such damages. An award cannot be based upon conjecture or speculation. Here, plaintiff has proven that a certain emotional disorientation occurred after his discharge. Based upon the testimony, the extent of plaintiff's distress was minimal, but it did directly result from the act of the defendant.

If damages for pain and suffering were appropriate, the plaintiff would be entitled to $1250.00. Finally, if these damages were to be awarded, the amount would not be included in calculating liquidated damages, if any. *Buchholz,* supra.

E. LIQUIDATING DAMAGES

29 U.S.C. §626(b) provides that "liquidated damages shall be payable only in cases of willful violations of this Act." Liquidated damages double the plaintiff's recov-

ery of backpay and other benefits. The key to their award centers on the word "willful," which neither the Act nor its legislative history chose to define.

Even though the ADEA adopts the enforcement scheme of the FLSA, resort to decisions under that Act concerning liquidated damages are not helpful since the term "willful" was added to the ADEA. In the case of *Wehr v. Burrourghs Corp.*, 619 F.2d 276, 280 (3rd Cir. 1980), the court said that the employer must act "deliberately, intentionally, and knowingly." The standard enunciated in *Wehr* was adopted by the court in *Kelly v. American Standard, Inc.*, supra, which acknowledged that,

> ". . . the award of liquidated damages is in effect a substitution for punitive damages and is intended to deter intentional violations of the ADEA." Id. at p. 979.

An award of liquidated damages does not automatically flow from a proven violation of the Act, because the plaintiff need not establish the defendant's state of mind as part of his prima facie case. Id. at p. 980. A "knowing and voluntary" violation of the Act is necessary to entitle a party to liquidated damages.

Since the ADEA requires a showing of willfulness, the defense of good faith, recognized under other statutory schemes, is not available to the defendant. Such a defense is superfluous. See *Wehr*, supra; and *Kelly*, supra; and *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979).

In order to analyze the defendant's state of mind at the time of the violation, a brief review of the circumstances is warranted. Prior to the effective date of the 1978 amendments to the ADEA (April 6, 1978), §626(f)(2)

permitted employers to discriminate on the basis of age if such actions were pursuant to the terms of a bona fide retirement plan. In other words, reliance by the defendant on the Wisconsin retirement plan had been a legal practice under §626(f)(2) of the Act. The 1978 amendments eliminated that exception.

The City Attorney for Wauwatosa testified that at the request of the employee relations committee, he made various efforts to determine the effect of the 1978 amendments on retirement plans of police and firefighters. He consulted a Wisconsin congressman and reviewed the reports of the Wisconsin RRC. He then advised the committee on June 12, 1978 (defendant's exhibit S) that age was still at BFOQ and that ". . . there have been no cases upholding age discrimination against the mandatory retirement of firefighters."

By November of 1979, after plaintiff's termination, the City Attorney had changed his opinion and so advised the committee (Defendant's exhibit T). In that correspondence he specifically refers to the elimination of the exception based upon a valid pension plan. The City Attorney stated that he changed his opinion because of the district court's decision in the case of *EEOC v. City of Janesville*, 480 F.Supp. 1375 (W.D. Wis. 1979) and an opinion of the Wisconsin Attorney General of November 1, 1979.

Plaintiff counters by arguing that the city was aware of court decisions contrary to the stated position of its City Attorney. On November 15, 1978, counsel for plaintiff advised the mayor of Wauwatosa by letter that there were several federal court decisions pertaining to firefighters. (Plaintiff's Exhibit 2). The letter requests that the city reverse its decision on plaintiff's retirement.

Although there was no definitive law in this circuit at the time the City Attorney first concluded that there were no ADEA cases involving firefighters, that was not the situation elsewhere. For example, on December 9, 1976, the court in *Aaron v. Davis,* 424 F. Supp. 1238 (E.D. Ark. 1976), held that the provisions of the ADEA applied, by virtue of the Fourteenth Amendment, to both an assistant city fire chief and district chief. In *Arritt v. Grisell,* 567 F.2d 1267 (4th Cir. 1977), the court similarly applied the ADEA to a local police officer. Both of these cases were decided well before the effective date of plaintiff's termination.

The defendant in terminating plaintiff did not proceed in ignorant bliss. It knew, or should have known, that the 1974 amendments to the ADEA had been held to apply to local government as regards its protective occupation employees. The same would be true for the 1978 amendments. The defendant did not proceed maliciously, but it proceeded upon the calculated belief that the decisions in other areas of the country would either be found to be erroneous or not applicable in this circuit.

The defendant should not be able to avoid the imposition of liquidated damages by either closing its eyes to the 1978 amendments or by choosing legal advice more palatable to its position. It continued to rely on the retirement plan exception which was no longer available. The facts of this case do not present an accidental or unintentional violation.

The defendant's actions meet the standard of "knowing and voluntary," and, as such, the plaintiff is entitled to liquidated damages.

In computing liquidated damages, the defendant's liability to plaintiff was established as of December 31,

1978. At that time it became obligated to pay to plaintiff any resultant damages for loss of pay and other benefits. The amount of mitigation should be deducted only after computing the total damage award which includes liquidated damages. To rule otherwise and reduce actual damages prior to calculating liquidated damages would unfairly penalize plaintiff who was under a duty to mitigate.

F. COMPILATION OF DAMAGES

Based upon the foregoing, the court finds that the defendant is obligated to the plaintiff for damages as follows:

1. Wages and other benefits for 1979, 1980 and 1981		$67,370.34
2. LIQUIDATED DAMAGES		$67,370.34
Total		$134,740.68
3. Reduction from total damages		
a. Interim Earnings	$	423.70
b. Unemployment compensation benefits	$	4,982.00
c. Pension benefits	[1]	
Total	[2]	
Net Total	[2]	

[1] The plaintiff received $1,243.69 per month, but it is unclear whether this was received for the entire period from January 1, 1979, to February 2, 1981. Since there was a stipulation regarding the monthly figure, the parties should be able to furnish the appropriate total amount without the necessity of a further hearing.

[2] As soon as the appropriate amount of pension benefits received can be ascertained, the total amount by which plaintiff's award is to be reduced can be computed.

IT IS THEREFORE ORDERED, that Plaintiff Stanley Orzel shall recover $134,740.68 plus costs and disbursements from defendant City of Wauwatosa Fire Department, said sum to be reduced by the amount of $5405.70 and to be further reduced by the total amount of pension benefits received by plaintiff for the period from January 1, 1979, to February 2, 1981.

IT IS FURTHER ORDERED, that the parties are to submit the stipulated amount of said total pension benefits no later than September 8, 1981, at which time judgment will be entered accordingly.

Dated at Milwaukee, Wisconsin, this 31st day of August, 1981.

Aaron E. Goldstein

AARON E. GOLDSTEIN
U. S. MAGISTRATE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STANLEY ORZEL,
Plaintiff,

v. Case No. 79-C-444

CITY OF WAUWATOSA FIRE DEPARTMENT,
Defendant.

SUPPLEMENTAL ORDER

In its decision and order in the above entitled action dated August 31, 1981, this court indicated that the plaintiff's recovery was to be reduced by the total amount of pension benefits received by the plaintiff for the period from January 1, 1979, to February 2, 1981. It was anticipated that the parties would be able to arrive at a stipulation regarding this total amount, and they were requested to file same with the court no later than September 8, 1981.

By letter dated September 3, 1981, counsel for plaintiff sets forth what he believes is the appropriate amount. He also indicates that he has been unable to contact counsel for defendant in order to arrive at a stipulation. Upon receipt of this letter, this court attempted to contact defense counsel by telephone and was advised that he was out of the office until September 9, 1981.

In order to avoid an undue lapse of time between the rendering of the decision and the entry of judgment in

this matter, counsel for defendant will be directed to respond to the letter on or before September 11, 1981.

On a related matter, counsel for plaintiff has inquired into the procedure this court wishes to utilize as regards attorney's fees. A successful plaintiff in an action under the Age Discrimination in Employment Act is entitled to reasonable attorney's fees, *Wehr v. Burroughs Corp.*, 477 F. Supp. 1012, 1015, (E.D. Pa. 1979), Aff'd and modified 619 F. 2d 276 (3rd Cir. 1980). The burden is on counsel for plaintiff to establish the appropriate amount. Once this is done, the judgment can be amended accordingly.

IT IS THEREFORE ORDERED as follows:

1. Counsel for defendant shall respond to the letter dated September 3, 1981, from plaintiff's counsel on or before September 11, 1981.

2. If plaintiff is seeking reasonable attorney's fees, a petition for same, together with all appropriate supporting documentation, shall be filed on or before September 18, 1981. Defendant shall have until September 28, 1981, to file any response to said petition, and plaintiff shall have until October 2, 1981, to reply.

Dated at Milwaukee, Wisconsin, this 8th day of September, 1981.

Aaron E. Goodstein

AARON E. GOODSTEIN
U.S. MAGISTRATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

STANLEY ORZEL,
Plaintiff,

v. Case No. 79-C-444

CITY OF WAUWATOSA FIRE DEPARTMENT,
Defendant.

SUPPLEMENTAL ORDER — II

The parties have now stated their respective positions on the total amount which is to represent pension benefits received by the plaintiff for the period of January 1, 1979, to February 2, 1981. Based upon the submissions, the monetary figures are not in dispute, but only whether a gross or net amount should be used for purposes of the judgment.

Plaintiff states that the total gross income received should be first reduced by the amount representing the return of the employee's contribution and then further reduced by the tax expense incurred. Defendant states that the total amount received, including that representing the employee's contribution, should be used.

As stated in the decision and order, the pension benefits are being computed to reduce plaintiff's recovery in order that he not be provided with double recovery for his lost employment. However, such reasoning does not apply to an employee's contribution to the Wisconsin Retirement Fund. It would be inequitable to permit the

defendant to benefit from the plaintiff's own contributions.

Therefore the sum total of $21,595.07 will be inserted in paragraph 3(c)(1) of page twenty four of the original decision and order in this case. That sum has been arrived at as follows:

1979 Pension Income	$13,680.59
1980 Pension Income	15,110.82
1981 Pension Income	$ 1,243.69
TOTAL GROSS PENSION INCOME	$30,035.10
Return of Employee's Contribution	8,440.03
NET PENSION BENEFITS	$21,595.07

When added to interim earnings and unemployment compensation benefits, the total amount to be reduced from plaintiff's recovery is $27,000.77, making a net total recovery of $107,739.91.

IT IS THEREFORE ORDERED, that judgment is to be entered accordingly.

Dated at Milwaukee, Wisconsin, this 10th day of September, 1981

Aaron E. Goodstein

AARON E. GOODSTEIN
U.S. MAGISTRATE

APPENDIX E

FEDERAL AND STATE STATUTES INVOLVED AND LOCAL ORDINANCES

Age Discrimination In Employemement Act

(As Amended 1978)

Title 29 USC

§ 623. Prohibition of age discrimination

(a) It shall be unlawful for an employer —

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization —

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

* * *

§ 626. **Recordkeeping, investigation, and enforcement**

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wage or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. * * *

* * *

Fair Labor Standards Act

Title 29 USC

§ 260. **Liquidated damages**

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

WISCONSIN STATUTES 1977

CHAPTER 41

PUBLIC EMPLOYES RETIREMENT (EXCEPT TEACHERS)

* * *

41.02 Definitions. In this subchapter:

(11) (a) "Protective occupation participant" means any participant whose principal duties involve active law enforcement or active fire suppression or prevention provided such duties require frequent exposure to a high degree of danger or peril and also require a high degree of physical conditioning. This definition is deemed to include any participant whose name is certified to the fund as provided in par. (d) and who is a conservation warden, conservation patrol boat captain, conservation patrol boat engineer, conservation pilot, conservation patrolman, forest fire control assistant, member of the state patrol, state motor vehicle inspector (if hired prior to January 1, 1968), policeman, including the chief and all other officers, fireman, including the chief and all other officers, sheriff, undersheriff, deputy sheriff, county traffic policeman, state forest ranger, fire watchman employed by the Wisconsin veterans home, or who is determined by his participating employer (or by his department head in the case of a state employe) to meet the qualifications seet forth in this paragraph.

* * *

(23) "Normal retirement date" means the day on which a participant attains the age of 60 years if he or she is or was a protective occupation participant; * * * but after June 30, 1974, normal retirement date for each protective occupation participant means the day on which the participant attains the age of 55 years. * * * "

* * *

41.11 Compulsory retirement; annuities.

(1) COMPULSORY RETIREMENT. Any participating employe, except an officer elected by the vote of the people, who has reached his normal retirement date on the effective date for his employer shall be retired at the end of his first calendar quarter year as a participating employe and any participating employe, except an officer elected by the vote of the people, who reaches his normal retirement date shall be retired at the end of the calendar quarter year in which such date occurs, unless, in either case, his employment is continued by his employer or appointing authority.

CITY ORDINANCE

Chapter 2.78

COMPULSORY RETIREMENT

Sections:

2.78.010 Compulsory retirement age.

2.78.010 Compulsory retirement age. A. Each person employed by the city in a protective occupation who is a participant in the Wisconsin Retirement Fund who reaches his normal retirement date as defined in Section 41.02(23) of the Wisconsin Statutes shall be retired at the end of the caledar quarter year in which such date occurs.

B. An exception to such compulsory retirement age as set forth in subsection A of this section may be granted by common council action to those current protective occupation employees of the city of Wauwatosa who will not have acumulated twenty-five years of creditable service under the Wisconsin Retirement Fund at the time they reach normal retirement date. Such protective occupation employee may be granted an extension of employment by the common council until such time as he has received twenty-five years of creditable service, but such extensions shall not be continue l beyond his sixtieth birthday, regardless of his length of service. (Ord. O-76-27 §1, 1976)

AN ORDINANCE

ADOPTED JULY 1, 1980

AN ORDINANCE REPEALING AND RECREATING SECTION 2.78.010 OF THE CODE OF THE CITY OF WAUWATOSA ENTITLED "DECLARATIONS".

The Common Council of the City of Wauwatosa do ordain as follows:

Part 1. Section 2.78.010 of the Code of the City of Wauwatosa is hereby repealed and is recreated as follows:

2.78.010 Declarations.

A. Among the protective services performed by the City is that of providing police, firefighting and rescue services. Personnel assigned to such protective services are required to perform emergency work involving physical exertion and stress. It is recognized that increased age increases the risk of physical failure due to stress or physical exertion and, therefore, for purposes of protecting the public and employees who rely on protective service employees, a specified age may be deemed to be a bona fide occupational qualification. It is further recognized that with recent developments in the law pertaining to age discrimination, there is uncertainty as to the applicability of this law to local government, to employees of the protective services.

B. It is deemed that for purposes of protective service employment that age 60 constitutes a bona fide occupational qualification.

C. Each person employed by the City in a protective service occupation who is a participant in the Wisconsin Retirement Fund shall be retired at the end of the calendar year in which such employee reaches age 60.

D. An exception to such compulsory retirement age as set forth in ss "C" of this section may be granted by the common council to those protective service employees of the City of Wauwatosa who upon medical examination and other tests demonstrate an ability to perform their respective job assignments beyond age 60.

Part 2. The Ordinance shall take effect and be in force from and after its passage and publication.

Office - Supreme Court, U.S.
FILED
AUG 10 1983
ALEXANDER L. STEVAS
CLERK

No. 83-205

In the Supreme Court of the United States

October Term, 1983

CITY OF WAUWATOSA FIRE DEPARTMENT,
Petitioner,

v.

STANLEY ORZEL,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS. 53212

QUESTION PRESENTED IN SUPPLEMENTAL PETITION

4. Does 28 USC § 636, which confers judicial power upon the United States Magistrates pursuant to which the judgment below was entered, conflict with Article III of the United States Constitution thus making the judgment void?

PARTIES

Petitioner, City of Wauwatosa, is a municipality located in Milwaukee County, State of Wisconsin. Stanley Orzel is an assistant fire chief employed by the City. The City and Orzel are the only parties to this case.

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STATEMENT UNDER RULE 28.4(b)

Since the proceeding draws into question the constitutionality of an act of Congress, Title 28 U.S.C. § 631, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such act of Congress has been drawn into question.

STATEMENT

Petitioner printed its Petition for Writ of Certiorari on August 5, 1983. It was filed August 8, 1983.

On August 5, 1983 the Ninth Circuit Court of Appeals held that the legislation that empowered U.S. Magistrates to perform judicial functions was unconstitutional. This supplemental petition is being filed within the 90 day period and adds a fourth issue to the Questions Presented in the original Petition.

The parties consented, in writing, to permit the Magistrate to try the case at bar (App. A-37). Thereafter, the U.S. Magistrate performed all of the judicial functions that would have been performed by the U.S. District Judge to which the case was originally assigned.

The Magistrate presided at the pretrial conferences; decided pretrial motions; presided at the trial; reviewed the post-trial briefs; heard oral argument; decided the issues presented; wrote the opinion; entered the Decision and Order for Judgment; and entered the Supplemental Orders for Judgment.

The appeal to the Court of Appeals was taken directly from the decision and judgment entered by the Magistrate pursuant to 28 USC § 636(c)(3). No U.S. District Judge reviewed or passed upon any of the actions taken by the Magistrate in this case.

No objection to this procedure was made by the Petitioner and the legal issue presented here was not presented to the Magistrate or to the Court of Appeals.

REASONS FOR GRANTING THE WRIT

The issue presented is important in the administration of justice in the federal courts. Parties are being solicited to give their consent to have their cases heard and decided by these court officers. The constitutional limits on the exercise of judicial powers by these magistrates should be stated by this Court before other pending cases proceed to judgment. If the U.S. Magistrate cannot legally function in the manner outlined in 28 U.S.C. § 636(c), further use of that procedure should be quickly and expeditiously terminated.

ARGUMENT

This Court has held that judicial powers cannot be conferred by Congress upon persons other than Judges appointed pursuant to Article III of the U.S. Constitution. *Northern Pipeline Co. v. Marathon Pipeline Co.*, —U.S.—, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982).

The statutes which empowered the Magistrate to perform all of the functions of the U.S. District Judge in the case at bar are also unconstitutional. *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix,* Nos. 82-3152 and 82-3182 (9th Cir. August 5, 1983). The Ninth Circuit raised the constitutional issue itself.

Magistrates are not appointed under the procedures outlined in Article III of the Constitution. The U.S. District Judges make the appointments. 28 U.S.C. § 631.

Unless the parties consent to their acting with full judicial power, the U.S. Magistrates have only limited powers and their decisions are subject to review by the U.S. District Judge. However, the consent features contained in 28 U.S.C. § 636(c) do not save the statute from

constitutional impediment since jurisdiction cannot be conferred upon any Court by consent. This Court has consistently held that "the consent of the parties cannot give jurisdiction to the courts of the United States in cases where it has not been conferred by the Constitution and the laws." *Cutler v. Rae,* 7 How. 729, 12 L.Ed. 890 (1849). *See also Minnesota v. Northern Securities Co.,* 194 U.S. 48, 24 S.Ct. 598, 48 L.Ed. 870 (1904); *Exporters of Mfrs.' Products v. Butterworth-Judson Co.,* 258 U.S. 365, 42 S.Ct. 331, 66 L.Ed. 663 (1922); *Mitchell v. Maurer,* 293 U.S. 237, 244; 55 S.Ct. 162, 79 L.Ed. 338 (1934); *National Ass'n for the Advancement of Colored People v. New York,* 413 U.S. 345, 353, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973); *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978).

CONCLUSION

The judicial power of the federal courts can be exercised only by persons appointed and acting pursuant to Article III of the U.S. Constitution.

The decision and judgment entered below was not made by a person so appointed or empowered. It is very likely that the judgment is void for that reason.

Petitioner submits that this Supplemental Petition presents an additional issue which this Court should consider and decide on the merits.

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APPENDIX

APPENDIX TO THE SUPPLEMENT TO THE PETITION

28 USC § 631. Appointment and tenure

(a) The judges of each United States district court and the district court of the Virgin Islands shall appoint United States magistrates in such numbers and to serve at such locations within the judicial district as the conference may determine under this chapter. * * * Where there is more than one judge of a district court, the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge. * * *

* * *

(c) Notwithstanding any provision of law to the contrary —

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. * * *

* * *

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

Office - Supreme Court, U.S.
FILED
OCT 28 1983
ALEXANDER L. STEVAS,
CLERK

NO. 83-205

In the Supreme Court of the United States

October Term, 1982

CITY OF WAUWATOSA FIRE DEPARTMENT,
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v.

STANLEY ORZEL,
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RESPONSE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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READINGS QUIK-PRINT, INC., MILWAUKEE, WI 53210

QUESTIONS PRESENTED

1. Is a municipal employer liable under the Age Discrimination in Employment Act where it fails to factually demonstrate that compulsory retirement of an Assistant Fire Chief at age 55 is reasonably necessary or rationally related to the particular purposes of the entity and occupation in question?

2. Did the Trial Court err in awarding liquidated damages where it found that the Petitioner had actual knowledge that its demand for Orzel's retirement "was in direct violation" of the Age Discrimination in Employment Act?

3. Did the District Court and the Appeals Court err in denying the petitioner leave to raise a statute of limitations defense where the City failed to raise that defense in its pleadings or at trial?

4. May the City of Wauwatosa challenge, in a supplemental petition, Section 28 U.S.C. § 636 which confers judicial power upon the United States Magistrates where it stipulated to the trial being conducted by the specific Magistrate and raises this issue for the first time in a supplemental petition for a Writ of Certiorari, not having raised the issue at trial, on appeal, or in two attempts to seek a rehearing.

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NO. 83-205

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF WAUWATOSA FIRE DEPARTMENT
Petitioner,

v.

STANLEY ORZEL,
Respondent.

RESPONSE IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable Chief Justice of the United States Supreme Court and the Associate Justices of the Supreme Court of the United States:

Respondent respectfully requests that the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit be denied.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 697 F.2d 743 (7th Cir. 1983). It is reproduced in Petitioner's Appendix B (App. p. A-3).

The decision and order of the Magistrate in the District Court was not officially reported. It is reproduced in Petitioner's Appendix C (App. p. A-37).

The decision of the Court of Appeals was entered on January 3, 1983. The Petition for Rehearing was denied on May 12, 1983 (Petitioner's App. p. A-1).

On May 24, 1983 the Court of Appeals denied the City's Motion for leave to file a second Petition for Rehearing. (Respondent's App. A-1).

STATEMENT[1]

The factual background of this case is set forth at the beginning of the opinion of the United States Court of Appeals for the Seventh Circuit in *Stanley Orzel v. City of Wauwatosa Fire Department*, 679 F.2d 743 (7th Cir. 1983) (Petitioner's Appendix B, p. A-3) and in the unpublished decision and order of the United States District Court for the Eastern District of Wisconsin (No. 79-C-444, August 31, 1981). (Petitioner's Appendix C, p. A-37). The Court's attention is directed to those opinions.

Stanley Orzel was born on October 24, 1923. He joined the City of Wauwatosa Fire Department in 1949 and advanced through the ranks and was appointed Assistant Fire Chief in 1970.

At the time of Stanley Orzel's discharge as a result of his attaining age 55, the City of Wauwatosa was the ninth largest city in the State of Wisconsin. The City maintains three fire stations which are spread out over the City's 13.1 square miles. Orzel was assigned to one of the three fire stations as an Assistant Fire Chief. Contrary to the Petitioner's assertion that Orzel is "usually the first fireman to respond to an alarm"

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[1]The Respondent is compelled to offer his own complete statement of the case as the Petitioner's statement refers to numerous matters outside the record, which, in several instances, are inaccurate.

(Petition p. 2), it is a geographical impossibility for Orzel or any other line officer to be the first one usually to respond to an alarm. In fact, an Assistant Chief does not even respond to many alarms.

Stanley Orzel was mandatorily discharged on December 31, 1978, the year in which he attained the age of 55. Orzel's discharge was accomplished by the use of Wauwatosa City Ordinance Chapter 2.78, *Compulsory Retirement*, which is reprinted, in part, in Petitioner's Appendix B, p. A-74. The ordinance provided for compulsory retirement of protective service employees at age 55. The City ordinance applied across the board and contained no provision for individualized determinations of fitness.

Orzel did not simply retire as claimed by the Petitioner, but actively sought to mitigate his loss by obtaining temporary work as a census taker, seeking employment with the U.S. Postal Service, and continuously checking for employment at the local State Job Service office. Orzel, in his search for employment, faced the difficulties of any 55 year old looking for work outside the realm of his life's avocation.

In December of 1979 the City made a conditional offer to reinstate Orzel subject to his taking and passing a medical exam. Orzel, on the advice of counsel, refused this offer as the City conditioned the offer on a right to reterminate Orzel's employment as soon as it could find some legal authority to do so. Also, the medical exam proposed by the City was itself discriminatory as only new recruits were required to undergo and pass a physical. Orzel was correctly suspicious of the City's motives given the fact that the City had earlier withdrawn a settlement offer which had been accepted by Orzel. Circuit Judge Richard D.

Cudahy, writing for the Seventh Circuit Panel, recognized that the City had not dealt in good faith, stating:

> "Under these circumstances, we do not believe it was unreasonable for Orzel, on the advice of his attorney to refuse the City's conditional offer to return to work." (Slip opinion p.25, Petitioner's Appendix B. p. A-27).

Prior to trial, the City stipulated that Stanley Orzel is "physically and mentally in excellent condition and good health and that no claim is made that he personally is not capable of performing all fire department functions." (Magistrate's decision and order p. 2, Petitioner's Appendix C p. A-37). Orzel was reinstated after the decision (1981) and has since performed his duties capably as Assistant Chief and, on several occasions, as Acting Chief of the Fire Department.

The Magistrate found that Orzel's discharge was an intentional violation of the ADEA and awarded both actual and liquidated damages. The award was reduced by an amount equal to unemployment compensation, retirement benefits and interim earnings. A direct quotation from the District Court decision is helpful in understanding the key factual issue in this case and why the decisions of the Courts below should be given great weight in denying the Petition for Certiorari:

> "Age 55 simply represented the majority viewpoint based on the surveys conducted. It was a convenient age to select and, it was some age, any age, upon which a benefit formula could be structured. *There is not a scintilla of evidence* to relate age 55, as opposed to ages 50 or 60, to the public interest and safety." (District Court opinion at p. 14, Petitioner's Appendix B p. A-53.) (Emphasis supplied).

> "The defendant has failed to establish that age 55 is reasonably necessary to operate an efficient fire department or that all persons within the class would be unable to perform their duties. It is not a BFOQ and defendant has violated the ADEA by forcing plaintiff's retirement at age 55." (District Court opinion at p. 15, Petitioner's Appendix B p. A-55.)

The Magistrate noted that an award of liquidated damages does not automatically flow when a violation of the ADEA is proven and that a "knowing and voluntary" violation of the act is necessary to entitle a party to liquidated damages.

The Trial Court's analysis of the City's "state of mind" was adopted by the Court of Appeals in its opinion and the Court of Appeals' analysis deserves quotation here. Referring to the District Court's decision, the Court of Appeals stated:

> "This reasoning tracks precisely the analysis employed by the court in *Sywock*, see 665 F.2d at 154-56. Next, the magistrate carefully reviewed the legal and factual circumstances surrounding the plaintiff's state of mind at the time the alledgedly discriminatory acts occurred.' *Sywock*, supra, 665 F.2d at 155. The magistrate noted that, prior to the effective date fo the 1978 ADEA amendments (April 6, 1978), section 626 (f) (2) of the Act arguably permitted employers to discriminate on the basis of age if such actions were taken pursuant to the terms of a bona fide retirement plan; in other words, until April 1978, the City's mandatory retirement of firefighters pursuant to the terms of the Wisconsin Retirement Fund was arguably justified under section 626 (f) (2) of the ADEA. The 1978 Amendments, however, clearly and unequivocably removed this exception, and there is ample evidence in the record that the City was

indeed aware of these amendments. The record also discloses that on November 15, 1978, counsel for the plaintiff advised the mayor of Wauwatosa that it was his 'considered opinion after carefully researching and reviewing all prior precedents concerning this issue,' that the City's demand for Orzel's mandatory retirement 'is in direct violation' of the ADEA. Pl. Ex. 2 (letter from plaintiff's attorney to Mayor James A. Benz)."

"Finally, this circuit's decision in *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975), also rendered well before the effective date of Orzel's termination, should have alerted the City to the substantial evidentiary foundation necessary to establish a BFOQ defense — a foundation which the City never attempted to develop here." (Slip opinion at p. 28-29, Petitioner's Appendix B, p. A 29-30).

ARGUMENT

I. THERE IS NO CONFLICT BETWEEN THE CIRCUITS ON THE APPLICATION OF THE BFOQ DEFENSE.

Section 623 (a) (1) of the ADEA provides that mandatory early retirement is permissable "where age is a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of the particular business...." The BFOQ exclusion of the ADEA has been applied in a consistent fashion by each Court to which the issued has been addressed. Each district and Circuit Court facing the issue has first noted that the BFOQ is to be interpreted very narrowly and that the burden is on the employer to demonstrate its applicability. *See, e.g. EEOC v. Janesville*, 630 F.2d 1254, 1258 (7th Cir. 1980); *Smallwood v. United Airlines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2299 (1982);

Houghton v. McDonald Douglas Corp., 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 966 (1977).

In addition, the Department of Labor, the federal agency originally entrusted with the enforcement of the ADEA, and the Equal Employment Opportunity Commission, to whom enforcement responsibilities were transferred in 1979 advocate an extremely narrow interpretation of the BFOQ defense.[2]

The standard to which an employer has been held has been consistently applied by the Circuit Courts of Appeal with only semantical variations. In order to prevail on a BFOQ defense, an employer must show that the age qualification is reasonably related to the "essential operation" of its business and must demonstrate that there is a factual basis for believing that all or substantially all persons above the age limit in question would be unable to effectively perform the duties of the job, or that it is impossible to determine job fitness. *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 419 U.S. 1122 (1975); *Usery v. Tamiami Tours, Inc.*, 531 F.2d 224, 235-36 (5th Cir. 1976); *Touhy v. Ford Motor Company*, 675 F.2d 842, 844-46 (6th Cir. 1982); *Stewart v. Smith*, 673 F.2d 485, 491 (D.C. Cir. 1982); *Smallwood v. United Air Lines*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied* 102 S. Ct. 2299 (1982); *Harriss v. Pan American World Airways*, 649 F.2d 670, 676 (9th Cir. 1980); *Houghton V. McDonald Douglas Corporation*, 553 F.2d 561, 564 (8th Cir.), *cert. denied*, 434 U.S. 966

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[2] "The concept of a bona fide occupational qualification will have limited scope and application," and "the burden of proof in establishing that (the exception) applies is the responsibility of the employer...(who) relies on it." 29 CFR 860.102(b) (1981) (superceded, September 21, 1981).

(1977). This two pronged formulation of the BFOQ defense tracks, verbatum, with the EEOC standard.[3].

Moreover, this discussion regarding the BFOQ defense must be qualified by the fact that the City offered no medical or scientific testimony whatsoever in support of its BFOQ position. Rather, it relied only upon reports issued by the Wisconsin Retirement Research Committee which pertained to actuarial assumptions regarding a fiscally convenient normal retirement age. As the Seventh Circuit noted, those reports support Orzel's position.

> "As the magistrate found, the reports indicate that the Wisconsin Retirement Funds choice of age 55 as a "normal retirement date" for protective service employees was not based on any scientific or medical data but, rather, was founded upon (1) a concern for public safety based upon the *subjective belief* that the aging process would take its toll particularly quickly on the physical and mental skills of these employees; and (2) the need to have a definite and financially feasible age upon which a retirement benefit formula could be based." (7th Cir. slip opinion at 20, Petitioner's Appendix B, p. 22.) (Emphasis in the original).

Circuit Judge William Pell's concurrence highlighted Wauwatosa's failure to meet its evidentiary burden.

> "As Judge Cudahy's opinion correctly points

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[3]An employer asserting a BFOQ defense has the burden of proving that 1) the age limit is reasonably necessary to the essence of the business, and either 2) that all of substantially all individuals excluded from the job involved are in fact disqualified, or 3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. 46 *Fed. Reg.* 47,727 (1981).

> out, the burden is on the employer to demonstrate that the BFOQ is reasonably necessary to the normal operation of the particular business. This, Wauwatosa despite its protestations to the contrary, simply has failed to do."
>
> "The setting of a retirement age as a BFOQ in certain occupations would seem to be a permissible governmental objective and in the case of firefighters this would relate both to the citizens of the community and the firefighters themselves. Wauwatosa has failed to demonstrate that this age should be 55." (Slip opinion at 32, Petitioner's Appendix P. A-34).

The City's contentions are based on the premise that it need only show that it arrived at a "good faith" judgement concerning the safety of its citizens. By that ambiguous standard, any employer could be excused from compliance and the purposes of the Act defeated.

The City has the obligation of justifying the particular age limit which was adopted. In the words of the District Court, there is virtually no evidence on the record to indicate that the City, in setting age 55 as its compulsory retirement age:

> "...(conducted) the appropriate balancing test that the policy underlining the ADEA requires. Age 55 simply represented a convenient age to select, and it was some age, any age, upon which a benefit formula could be structured." (Decision and Order at 14, Petitioner's Appendix B p. A-53).

The ADEA forbids such arbitrary distinctions based on stereotyped assumptions rather than analysis or determinations based on individual merit. *See, Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702, 709-710 (1978).

The Petitioner has cited the Supreme Court decision in *EEOC v. Wyoming*, ___ U.S. ___, 75 L.Ed. 2d 18 (1983) to suggest that the standard by which the City should be governed is that which the United States Congress has adopted for Federal Protective Service employees. 5 U.S.C. § 8335. Even prior to the *Wyoming* decision, the Petitioner claimed that 5 U.S.C. § 8335(b), which compels retirement at age 55 for federal firefighters, justifies the City's adoption of an ordinance which forces retirement at that age.

This argument has previously failed to sway the Supreme Court in *EEOC v. Wyoming* and the Courts below in this matter. First, the standard to which the City of Wauwatosa must adhere to is not that which the federal government has adopted for its protective service employees. The standards of scrutiny to be applied to statutes regulating the forced retirement of federal as opposed to state and local government employees differ, since federal protective services are not subject to provisions of the ADEA. It need only show that its actions are rationally related to a permissible governmental objective. *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

The appropriate standard to be applied in this matter is that the compulsory retirement scheme be reasonably necessary to the essence of the *Wauwatosa's* objectives, not those of federal agencies. 29 U.S.C. § 623 (f)(1); *Harriss v. Pan American World Airways*, 649 F.2d 670, 677 (9th Cir. 1980).

The opinion of the Seventh Circuit refutes the analogy to federal employees on two grounds. First, the federal retirement statute contains an express provision which allows the head of federal agency to exempt a protective service employee from automatic separation until the employee becomes 60 years of age

when the public interest so requires. 5 U.S.C. § 8553 (b).

> "Thus, unlike the compulsory retirement scheme in place in Wauwatosa at the time of Orzel's termination, the federal retirement scheme expressly allows for individualized determinations of fitness in exceptional cases." (Slip opinion at p. 9, Petitioner's Appendix p.A-11).

Second, in an attempt to use the federal statute to meet its burden of proof, the Petitioner failed to show any similarity whatsoever in the command functions of federal firefighting personnel as opposed to those a surburban fire department.

The burden of demonstrating that there are differences in firefighting in differing cities and services is on the municipal employer who attempts to apply the BFOQ defense.[4] This principle was expressed in *Aaron v. Davis*, 414 F. Supp. 457, (E.D. Ark. 1976):

> "The defendants and intervenors further suggested that the problems and the risks of the firefighter in Little Rock were not substantially different from those of firefighters in smaller cities or large metropolitan areas. On the basis of the evidence, the Court disagrees with this proposition. Although firefighting appears to be a relatively hazardous occupation regardless of the local circumstances, still those local circumstances can materially alter the degree of the hazard and the risks involved."

Further, a reading of the congressional record

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[4]See *Tuohy v. Ford Motor Company*, 675 F.2d 842 (6th Cir. 2), the existence of FAA "age 60 rule" for commercial airline pilots does not establish, as a valid BFOQ, the same retirement age for non-commercial pilots.

which reports the debate from the bill which eventually became 5 U.S.C. § 8335, suggests that it would be naive to think that the separation of federal firefighters at age 55 has any relationship to the ability of federal employees to perform their jobs. The statements of Representatives Gross and Derwinksi during debate demonstrate that the bill was an effort to attain a generous liberalization of retirement benefits for 56,000 federal employees, mostly police or FBI agents.

> "MR. GROSS: Madam Chairman, this is ill-conceived legislation at any point in time. There is no demonstrated need for improving retirement benefits for law enforcement and firefighting personnel, which are already quite liberal." 119 Cong. Rec. (1973), p. 30593.
>
> "MR. DERWINKSI: The package which finally emerged from the committee was conceived as H.R. 2654, a bill that had as its specific purpose a generous liberalization of retirement benefits." 119 Cong. Rec. (1973), p. 30594.

The federal protective service employees lobbied vigorously for the enhancement of retirement benefits.

> "MR. DERWINSKI: I think we have spent so much time hearing from and being pressured by the federal employe organizations that we do not maintain objectivity. I think this is a case of where we have listened to the requests of some of these organizations and we have not kept in mind the impact on the taxpayer which this precedent sets." 119 Cong. Rec. (1973), p. 30595.

The BFOQ standard applied by the District and Trial Courts does not conflict with that of *Hodgson v. Greyhound Lines*, 499 F.2d 859 (7th Cir. 1974), cert. den. 419 U.S. 1122 (1975) or its progeny. Certiorari

should not be granted — there being no conflict between the decisions of this Court and the Circuit Courts of Appeal. Certiorari should not be granted in a case where the Courts below have factually determined that the Petitioner failed to demonstrate *any* "reasonableness" or "necessity" for its discharge of an Assistant Fire Chief at age 55.

II. NO CONFLICT BETWEEN THE CIRCUITS EXISTS ON THE APPLICATION OF THE UNCOMPLICATED RULE FOR AWARDING LIQUIDATED DAMAGES.

The Age Discrimination in Employment Act, 29 U.S.C. § 626(b), provides that liquidated damages are payable in cases of willful violations of the act. Although the ADEA adopts the enforcement scheme of the Fair Labor Standards Act, decisions under that act concerning liquidated damages are not helpful since the term "willful" is found only in the ADEA.

In *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981) liquidated damages are described as a substitute for punitive damages and are intended to deter intentional violations of the ADEA.

As the ADEA requires a factual demonstration of willfulness, the defense of good faith, recognized under some statutory schemes is not available to the City of Wauwatosa. Such a defense is superfluous. *Wehr v. Burroughs Corporation*, 619 F.2d 276, 280 (3rd Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979); *Goodman v. Hueblein, Inc.*, 645 F.2d 127 (2nd Cir. 1981); *Blackwell v. Sun Electric Corp.*, 696 F.2d 1176 (6th Cir. 1983); *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir., cert. denied 454 U.S. 860 1981); *Syrock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149 (7th Cir. 1981).

There is no inconsistency or conflict between the Circuit Courts in the imposition of the ADEA's sanction of liquidated damages when a "knowing and voluntary" violation of the act is demonstrated. *Syrock v. Milwaukee Boiler Mfg. Co.*, supra.

The only question presented for review is one of fact. The factual issues have been conclusively reviewed by the Seventh Circuit. The award of liquidated damages is premised on the District Court's finding of willfulness. As previously noted, prior to Orzel's discharge, the Petitioner was alerted by Respondent's counsel that its actions were violative of the ADEA. The Petitioner knew or should have known that the 1974 Amendments to the ADEA had been held in *Aaron V. Davis*, 424 F. Supp. 1238 (E.D. Ark. 1976) and *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977) to apply to local governments and their protective occupation employees.

The Petitioner seeks only a factual review of the Seventh Circuit's conclusions that:

> "In light of these factual and legal circumstances, we agree with the magistrate's implicit conclusion that the City knew or reasonably should have known of the requirements of the ADEA and that the City knew or reasonably should have known that its termination of Orzel was inconsistent with those requirements." (Slip opinion at p. 29, Petitioner's Appendix B, p. A-31).

III. THE PETITIONER'S FAILURE TO RAISE A STATUTE OF LIMITATIONS DEFENSE AT TRIAL CONSTITUES WAIVER.

The petitioner has argued that Orzel did not timely file his discrimination charge with the appropriate administrative agencies and that under *Delaware*

State College v. Ricks, 449 U.S.250 (1980) the charge was time barred. The City did not affirmatively raise this point in its answer or in any other pleading. The Seventh Circuit at footnote 8 of its decision (Petitioner's Appendix p. A-8) disposed of this issue. *Delaware State College v. Ricks* was decided two months prior to the commencement of the trial in this matter and two years after Orzel was discharged. The Petitioner has advocated a retroactive application of the *Delaware State College* decision. Both the District and Circuit Courts refused to apply the *Delaware State College* decision retroactively as that intent cannot be properly inferred from the Supreme Court's decision in *Delaware State College v. Ricks*.

IV. THE PETITIONER MAY NOT, FOR THE FIRST TIME, RAISE OBJECTIONS TO THE AUTHORITY OF A MAGISTRATE TO ACT IN ITS SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI.

Prior to trial in the District Court for the Eastern District of Wisconsin, both parties consented in writing to refer this matter to United States Magistrate Aaron Goodstein for the purpose of conducting trial. The Chief Judge of the District ordered that the action be transferred to Magistrate Goodstein for "all further proceedings." (Respondent's Appendix B, p. A-1).

The case was tried before Magistrate Goodstein in February of 1981. At no time prior to (or during) the trial was an attempt made to withdraw from the Stipulation or to object to the Magistrate's authority. Post-trial arguments were held in July of 1981 and again there were no objections to the Magistrate's authority to act.

The City, as appellant, requested the Seventh

Circuit to review several aspects of this case. No objection to the Magistrate's authority was made in the appellant's brief, reply brief or in oral argument to the Seventh Circuit Panel.

The City filed a petition for rehearing which requested a review of every issue which had been raised on appeal. The Respondent was requested to answer the City's petition for rehearing and each issue was again thoroughly briefed as to current law. No argument was presented at the time of the petition for rehearing which challenged the Magistrate's authority.

After the petition for rehearing was denied, the City brought a motion for leave to file a second petition for rehearing. No objection to the Magistrate's authority was raised in support of this motion.

It is only in the supplement to the petition for a writ of certiorari that the issue of the Magistrate's authority has been raised. This despite the fact that *Northern Pipeline Construction Company v. Marathon Pipeline Company*, _____ U.S. _____, 102 S. Ct. 2858 (1982), upon which the Petitioner relies, was decided on June 28, 1982.[5] *Northern Pipeline* was widely reported in the general media and in professional journals. The Petitioner had the opportunity to inform the Seventh Circuit Court of Appeals that it felt *Northern Pipeline* was relevant to this action prior to the issuance of the Seventh Circuit's decision in January of 1983.

It is widely understood that the extraordinary power of the United States Supreme Court will not be invoked to undertake the review of matters which

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[5]Rule 21 of the Supreme Court rules allows for the filing of a supplemental brief to call attention to "...new cases...not available at the time of the party's last filing."

were not presented to Federal Courts below. *Youakim v. Miller*, 425 U.S. 231, 233-234 (1976); *Walters v. City of St. Louis*, 347 U.S.231 (1954); *New York Dock Company v. The Poznan*, 274 U.S. 117 (1927).

It is only in exceptional cases that the Supreme Court will consider questions not pressed or passed upon below. *Duignan v. United States*, 274 U.S. 195, 200 (1927).

This case does not represent such exceptional circumstances. The Supreme Court has already passed on the inherent constitutionality of the delegation of authority to Magistrates under 28 U.S.C. § 636. *United States v. Raddatz*, 447 U.S. 667 (1980).

Furthermore, on October 3, 1983 this Court declined to grant certiorari in a case which raised the issue of a Magistrate's authority to conduct a civil trial without a de novo review by the District Court. *Western Food Equipment v. Foss America*, (No. 82-2044, CA 9)(Cert. Den. 10-3-83).

Lastly, justice requires that the Petitioner be estopped from raising the issue of the authority of the Magistrate when the Petitioner has consented to such action.[6] The Petitioner has had, over the last few years, many opportunities to raise the issue of the Magistrate's authority and has not done so. It should not be allowed to do so in its petition for certiorari.

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[6]See *Gelfren v. Republic Life Insurance Co.*, 451 F.Supp. 1229 (C.D. CA 1978) and Silberman, *Masters and Magistrates Part II: The American Analogue*, 50 N.Y. Univ. L.J. 1297, 1350-1354 (1975).

CONCLUSION

The only real questions the City of Wauwatosa raises in its petition turn on the particular facts of this case alone. In essence, Petitioner asks this Court to make a third review of the lengthy trial record to see if it can find what two previous courts have been utterly unable to find — some proof that the City did not act intentionally in violating the ADEA. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings of the Courts below are treated with and entitled to great weight. The determinations below constitute a finding of fact, to which the "clearly erroneous" standard applies. *Pullman Standard v. Swint*, 102 S. Ct. 1781, 1788-1981 (1982). In the present case, the Petitioner raises questions turning entirely on the facts of this case, already resolved twice (three times when the Petition for Rehearing is considered) in favor of the Respondent.

None of the questions presented in the Petition for a Writ of Certiorari rise to the "special and important reasons" standard of U.S.C. Rules of Court, Supreme Court Rule 17.

It is respectfully submitted that the petition be denied.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

May 24, 1983

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

STANLEY ORZEL,

Plaintiff-Appellee,

vs.

No. 8102564

CITY OF WAUWATOSA FIRE DEPARTMENT,

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 79 C 444—**Aaron E. Goodstein**, *Magistrate*

This matter comes before the court its consideration on the following documents:

1. "MOTION FOR AN ORDER GRANTING LEAVE TO FILE A PETITION FOR REHEARING EN BANC" filed herein on May 19, 1983, by counsel for defendant-appellant.
2. "MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE A PEITION FOR REHEARING EN BANC" filed herein on May 19, 1983, by counsel for defendant-appellant.

The decision in this case was issued on January 3, 1983. On January 17, 1983, appellant filed a petition for rehearing. Rehearing was denied on May 12, 1983.

Appellant now seeks leave to file a petition for rehearing **en banc**. Circuit Rule 16 requires that a petition for rehearing and a suggestion for rehearing **en banc** be filed within 14 days of this court's decision. Appellant has failed to cite any authority that would support its request to file its suggestion for rehearing **en banc** outside the 14 day limit and after the court had denied a petition for rehearing. Accordingly,

IT IS ORDERED that appellant's motion for leave to file a petition for rehearing **en banc** is hereby DENIED as untimely.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

STANLEY ORZEL,

Plaintiff,

vs.

C.A. No. 79—C-444

CITY OF WAUWATOSA FIRE DEPARTMENT

Defendant.

ORDER

The parties having consented to the exercise of jurisdiction of this action by a magistrate,

IT IS THEREFORE ORDERED that this action may be and hereby is transferred to United States Magistrate Aaron E. Goodstein for all further proceedings.

Date at Milwaukee, Wisconsin, this 6th day of May, 1980.

John W. Reynolds

JOHN W. REYNOLDS
CHIEF JUDGE

Office-Supreme Court, U.S.
FILED
NOV 3 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-205

In the Supreme Court of the United States

October Term, 1982

CITY OF WAUWATOSA FIRE DEPARTMENT,
Petitioner,

v.

STANLEY ORZEL,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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OTHER AUTHORITIES

Rule 15, Fed. R. Civ. P. 4

I. RECENT CASES INVOLVING THE CONFLICT IN CIRCUITS.

A. In *EEOC v. University of Texas,* 710 F.2d 1091 (5th Cir. 1983) the court affirmed the finding of the district court that age was a BFOQ permitting the University to reject applicants for employment as campus law enforcement officers at age 45.

B. In *Hoefelman v. Conservation Commission,* — F. 2d —, 32 FEP 1773 (8th Cir. 1983) the court affirmed a district court decision which held that pilots above the age of 60 could be prohibited from flying state Conservation Commission aircraft. The Commission had done no independent research of its own prior to formulating its retirement policy and relied solely on the studies made by the FAA. Conflicting medical evidence was introduced at trial by the respective parties and the court accepted the testimony of the defense experts. See also *Criswell v. Western Airlines,* — F.2d —, 32 FEP 1204 (9th Cir. 1983).

C. In *EEOC v. Wyoming,* — U.S. —, 103 Sp. Ct. 1054, 75 L.Ed.2d 18 (1983), on remand to the district court for trial, the jury made the finding that age 55 was a BFOQ for conservation wardens in the State of Wyoming, *New York Times,* October 13, 1983, p. 15.

D. In *Maki v. Comm. of Education,* 32 FEP 630 (N.D.N.Y. 1983) the court held that age 65 was a BFOQ for school bus drivers.

E. In *Heiar v. Crawford County,* 82-C-273 (W.D. Wis. 1983) *unreported,* conflicting medical testimony was offered by the parties and the trial court accepted the testimony of the medical experts called by the plaintiffs. The court held that age 55 was not a BFOQ for deputy sheriffs.

A decision involving firefighters to the same effect was made in *Johnson v. City of Baltimore,* 515 F.Supp. 1287 (Md. Dist. 1981) in which the trial court chose to accept the testimony of the plaintiff's experts instead of the testimony of the experts called by the defense. An appeal is pending in the 4th Circuit.

The legislatures, both state and federal, have established a uniform retirement policy to be applied to law enforcement and firefighter classifications. But the developments under ADEA in the trial and appellate courts are presenting a checkered pattern with different results being reached on a state to state and district to district basis.

The state agencies look to this Court for a uniform rule; one which will permit them to fund a uniform retirement system for law enforcement and firefighting personnel, and permit them to recruit, train, promote and replace the retirees on a predictable schedule, as does the federal government. *Vance v. Bradley,* 440 U.S. 93; *Bowman v. Dept. of Justice,* 510 F.Supp. 1183 (E.D. Va. 1981), aff. 679 F.2d 876, *cert. den.* 103 Sp. Ct. 494.

II. THE LIQUIDATED DAMAGES ISSUE.

A number of cases are still pending in the lower courts that arose because of retirements that occurred shortly after the 1978 amendments to the federal ADEA. One of the serious legal issues presented in those cases was the constitutionality of the application of this federal law to the state and local governments. This issue was not resolved until the decision of this Court in ***EEOC v. Wyoming,*** — U.S. —, 103 S. Ct. 1054, 75 L.Ed.2d 18 (1983).

In *Whitfield v. City of Knoxville*, 32 FEP 1052 (E.D. Tenn. 1983) the court specifically held the City's actions were not willful violations of ADEA because they were "taken in good faith and reliance on the theory that the Act could not constitutionally be applied to the City."

However, in addition to litigating in good faith the unsettled legal issues in this area of the law, affirmative evidence of the City's *good faith* is present in this case.

On December 18, 1979 (within one year of his retirement) the City advised counsel for respondent that his client should return to work and arrangements were made for the routine pre-employment physical examination (D. Exh. "U"). The response was a refusal to submit to a physical (D. Exh. "V"). All settlement discussions occurred subsequent to this correspondence (Exh. "DD"). The respondent was unilaterally returned to work on February 2, 1981 without a physical examination and *prior* to the commencement of the trial (Tr. 81). He is still working at this time.

In addition, the City amended its ordinance temporarily raising the retirement age from 55 to 60 to avoid causing further retirements and litigation of this kind.

Finally, there was no basis for ordering liquidated damages as a deterent since the City had amended its ordinance thus showing its willingness to comply with federal law. The City was unwilling to totally capitulate to the plaintiff's claim in the case at bar. However, a good faith effort to litigate the kind of issues involved in these proceedings is not evidence of a "willful" violation of law.

III. THE STATUTE OF LIMITATIONS.

The statute of limitations, while not raised in the pleadings, was raised at trial. The Magistrate sustained the plaintiff's objection to the receipt of the evidence offered to show that the statute barred the action (Tr. 79-80). Under Rule 15 of the Federal Rules of Civil Procedure the trial court should have accepted the evidence, examined it and considered whether there was any prejudice to the respondent in giving consideration to that legal issue.

IV. PARTIES CANNOT CONFER JURISDICTION UPON A MAGISTRATE BY CONSENT.

In *Pacemaker v. Instromedix, Inc.*, 712 F.2d 1305 (9th Cir. 1983) the court specifically rejected the position advanced here by the respondent that the litigants' consent to the trial before the Magistrate was sufficient to satisfy the Article III concerns. Parties cannot confer jurisdiction by consent or waiver. The court held in *Pacemaker* that "the requirement of an article III judge is jurisdictional and thus not waivable." (712 F.2d at p. 1312).

CONCLUSION

The issues presented in the Petition are of great importance to the communities in the nation that are responsible for providing police and fire protection for their residents. The age of the personnel working in these departments is of critical importance and age has been recognized as a relevant factor by both Congress and the state legislatures in the recruitment and retirement of these employees. However, with some courts accepting and others rejecting these legislative findings, municipal employers will be unable to act uniformly in the recruitment and retirement of law enforcement and firefighting personnel unless this Court resolves the judicial conflict. For these reasons, and for the reasons stated in the Petition, it is respectfully submitted that this Petition be granted.

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